

Seeking Supremacy: The Pursuit of Judicial Power in Pakistan

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Introduction

Pakistan's judiciary, specifically the superior judiciary (i.e., the five High Courts and the Supreme Court) forms the core and substantive part of the country's legal, political, constitutional, social, and even economic infrastructure. The judges of the superior judiciary have opined on matters as diverse as electoral laws, enforced disappearances, the environment, child marriages, and even encroachments on public spaces, amongst many other subjects. The politicisation of the judiciary (or, as some have termed, the judicialization of politics) has become a focal discussion point in mainstream media and academic circles, especially in the *suo motu* era. Some have focused primarily on the alleged differential treatment meted out to political parties, depending on who controls the roster at any point. The Constitution of the Islamic Republic of Pakistan, 1973 (the 'Constitution') is the core guiding principle of judicial review in the Pakistani context. Indeed, following the conclusion of the Second World War, global rhetoric can be said to have shifted from ideological concerns to the enforcement and upholding of universal human rights. It is, then, proper that the scope of analysis in the reviewed book in this essay starts roughly from that point in South Asian, specifically Pakistani, history.

An Audience-Based Framework

Yasser Kureshi's *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan*¹ makes a tremendous contribution to the studies of judiciaries in post-colonial South Asia. Published by the Cambridge University Press in 2022, it provides a critical inquiry into how and why the judiciary evolved from being an institution that historically legitimized military rule to one that has increasingly challenged both military and civilian power. The central argument of the book is that the shift in judicial behaviour is best understood through an 'audience-based' framework,

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¹ Yasser Kureshi, *Seeking Supremacy: The Pursuit of Judicial Power in Pakistan* (CUP 2022).

which focuses on how the judiciary's institutional preferences are shaped by the political, social, and professional networks it interacts with.

Yasser Kureshi is a rising scholar in the field, associated with the University of Oxford. He completed his undergraduate programme in Philosophy, Politics, Economics, and History from the University of Pennsylvania, before pursuing a Juris Doctor certification from the Boston University School of Law. He was then appointed as a Senior Teaching Fellow with the Department of Politics and International Studies at the School of Oriental and African Studies. This was followed by his appointments as the John and Daria Barry Postdoctoral Fellow in Constitutional Theory and Law at the Trinity College and then as a departmental lecturer for the Contemporary South Asian Studies Programme in the Oxford School of Global and Area Studies at the University of Oxford. His papers have been published in the *Journal of Conflict Resolution*, *Comparative Politics* and *Democratization*. This book arose out of Kureshi's dissertation titled *Judging the Generals*, with a similar line of thought and thesis, completed during his years at Brandeis University, for which he was also conferred with the Edward S. Corwin Award by the American Political Science Association in 2019.

A Periodised History of Judicial Behaviour

The book begins dramatically with a description of the events surrounding the downfall of former Pakistani President Musharraf in 2007-08, which have been termed subsequently as the 'Lawyers Movement'. Emboldened by the refusal of Chief Justice of the Supreme Court ('CJP') Iftikhar Chaudhary to resign in the face of pressure from military circles following *suo motu* cases on military interests, along with pictures of the Chief Justice being manhandled by Islamabad Police as he was forced out of office, bar associations galvanised into action. The initial pretext was the restoration of the CJP, but soon the movement became gigantic as lawyers and civil society activists poured into the streets to protest Musharraf's unconstitutional grip on power. In his own words, these were formative years for author Yasser Kureshi, who has since specialised in researching and writing about judicial populism in post-colonial societies.

Kureshi uses this anecdote as the launch pad for the central question of the book, i.e., what explains judicial behaviour in terms of its acceptance or resistance

to military regimes and their actions? In his introduction and literature review, he examines several competing theories that try to answer this question, but all fall short when tested against the mettle of his analysis. The strategic interest theory that judges work to preserve survival fails to explain the high-risk judicial assertiveness, e.g., in the Musharraf era, when the military was dominant, and survival lay in allying with the military. The ideological interest theory treats judicial ideology as the precursor for their action, but tends to overlook the role of external factors in shaping the ideology, and, for Kureshi, places the cart before the horse.

Kureshi sympathises with the institutional approach (appointment processes shaping norms) but combines it with the role of the external audience of the judiciary to arrive at his original 'audience-based framework'. His argument is that in Pakistan, originally, judges were primarily accountable to the military, which had a decisive role in their appointments, promotions, and professional status. However, over time, the influence of the military waned as bar associations and civil society organizations became more important. This shift in judicial audiences led to a transformation in judicial preferences, making courts more willing to challenge military rule. For the reader who is uninterested in complex academic theories about bureaucracies and institutional linkages, this section may appear monotonous and unexciting. But for academics, scholars, jurists, and senior lawyers, this deep dive into theory is a reassurance about the grounding of Kureshi's thesis.

Based on his theoretical assertions, Kureshi divides the judicial history of Pakistan into time periods, depending on the attitudes of the judiciary. Section II is titled 'The Loyal Court' and deals with the years between 1947 and 1977. These were the years of extreme constitutional and political instability in Pakistan, with military dictators Ayub Khan and Yahya Khan controlling the power apparatus of the country, two constitutions, both of which were abrogated, the secession of East Pakistan as Bangladesh, and the first general election in the country, followed by another military coup orchestrated by General Zia-ul-Haq. Kureshi argues that the superior judiciary during this time closely followed the lead of the military in the political setup of the country, eventually replacing the bureaucracy as the junior partner to the military in the repression of democracy. The author explains this by noting that during this time, the military almost completely controlled the fortunes of the superior judiciary: appointments, promotions, dismissals. They were aided,

initially, by the Government of India Act, 1935, a colonial-era leftover and temporary supreme law until a constitution could be promulgated to replace it. The colonial powers had prioritised order over the rule of law, a habit that was inherited by post-colonial rulers. This was coupled with another crucial reason why the military alone remained the critical audience for the judiciary—the lack of any substantive and longstanding relationship between the judiciary and the country's bar associations.

The judges at this time were more often than not educated in elite Western universities, and did not share the sense of camaraderie with bar associations that they would come to espouse. Kureshi rightly distinguishes between the bar councils (semi-governmental organisations chaired by the Attorney- or Advocate-Generals) and the bar associations (voluntary, regulative organisations) in this analysis; bar councils had a closer relationship with the judiciary, compared to the bar associations, because the state had more stakes in it—the state being populated by the bureaucratic and military elite that had shared spaces and ideology with the bar associations and the western educated judiciary.

Section III is titled 'The Controlled Court' and deals with the years between 1977 and 1999. Here, Kureshi begins to see a fragmentation between the military and the judiciary, as the latter's critical audience begins to shift from the military to the bar associations. Kureshi very meticulously sets out to unpack the 'constrained autonomy' that the judiciary exercised under military regimes and their historical oscillation between subservience and strategic assertion of power. As the reputations of the judges became a greater concern, largely due to the detriment suffered during earlier years, younger lawyers became increasingly critical of the military-judiciary nexus in the pursuit of unlawful and undemocratic interests. Bar associations, by this time, had become more politically active as mainstream political parties were driven out of the socioeconomic and political sphere. Therefore, judges became more protective and conscious of what lawyers thought of them, as their endorsement or condemnation of judicial decisions had the power to influence the public perception about judicial legitimacy, especially during periods of military rule.

Another reason for the judiciary's attempts at diversifying its support base had to do with the fact that the Constitution had granted the superior judiciary

substantial powers in the enforcement of fundamental rights and the arbitration of major disputes. When the military returned in 1977, it sought to reverse this grant of power, which the judiciary vehemently opposed. During this period, the judiciary was highly protective of its rights, duties, and powers in the face of challenges from external forces; strategically asserting its autonomy in certain cases while normalizing judicial restraint and subjugation in others, often as a pragmatic move to maintain judicial operation during periods of dictatorship or authoritarianism. As such, it continued to side with the military on other matters, not related to the privileges and powers of the judiciary, e.g., validating General Zia's coup and rule and making it difficult for popular political parties to pursue their mandates. In this sense, the judiciary continued in its dislike for popular democracy. The 'Controlled Court' was thus not only a result of the relationship between the state and the judiciary but also embedded within the politics of the legal community. This reveals a more complex reality of how the legal community alternated between selfishly sustaining itself with the very system it sought to fight against from time to time.

Finally, the last section discusses the re-emergence of the judiciary as a key stakeholder in the national power dynamics, embodying the very essence of its title—'The Confrontational Court'. It describes the blatant rejection by the judiciary of what the military believed was its prerogative in the partnership, 1999 onwards. The cracks that had appeared in the previous section widened to the point of a complete break in 2007-08, when Musharraf was forced out of power by a popularly elected Parliament and a resolute legal community, ultimately leading to the reinstatement of CJP Iftikhar Chaudhary. Initially, when General Musharraf launched a coup in 1999, the judiciary surrendered and validated it. However, this time around, it was determined to confront the military establishment head-on and adopt a no-compromise stance on fundamental rights and judicial independence.

One of the strongest demonstrations of this shift was the Supreme Court of Pakistan's ('Court') spree of *suo motu* cases against military interests and its refusal to award the death penalty to Nawaz Sharif, unlike 1979's verdict to hang Zulfikar Ali Bhutto. Both were popularly elected prime ministers, and the judiciary's refusal to tow the military's line symbolised its break from its erstwhile senior partner. Kureshi argues that by this time, the process of judicial appointments had completely shifted into the hands of the judiciary itself (specifically through the *Al-*

Jehad Trust case² and the 19th Constitutional Amendment³), which meant that the military was no longer a critical audience capable of determining the fortunes of the judges. The judiciary became increasingly assertive as it introduced the notion of *suo motu* in the already-loaded arsenal of judicial review. Through this mechanism, the judiciary challenged the military's economic, political, and strategic privileges and crafted a table for itself in policy-making circles. The *suo motu* notices issued on the question of enforced disappearances particularly irked Musharraf and the military. As a result, bar associations became the foremost audience to which judges directed their opinions and decisions. This collaboration reached its high point in the 2007 Lawyers' Movement.

This growing alignment between the judiciary and the legal community not only reshaped judicial activism but also reflected a broader shift in the composition of the superior judiciary. The judges holding positions in the superior judiciary during this time were more likely to be educated in Pakistan rather than the West, leading to a weakening of institutional linkages with the country's elite sectors. Indeed, both CJP Iftikhar Chaudhary and Justice Saqib Nisar (who used *suo motu* much more frequently than others) were educated in Pakistan. Kureshi argues that this was important in developing a sense of unity with the bar, most of whose members were also educated in Pakistan. As elite lawyers from wealthier families were uninterested in bar politics and declined judicial appointments, the judicial playground opened up for their middle-class, Pakistani-educated counterparts.

Unpacking the Argument

For Kureshi, the distinction between Western and Pakistani legal education was crucial in shaping judicial behaviour. Western-trained judges impressed lawyers with procedural expertise, while Pakistani-educated judges, focused on outcomes, sought legitimacy through bold rulings. As the judiciary shifted towards the latter, its emphasis on dramatic justice fuelled judicial activism, culminating in the Lawyers' Movement, where judges and bar associations united to challenge

² *Al-Jehad Trust v. Federation of Pakistan and others* PLD 1996 SC 324; this judgement had held that Articles 177 and 193 mandate the inclusion of the Chief Justices of the Court and High Courts in the process of judicial appointment.

³ Through the 18th Constitutional Amendment, the process of judicial appointments gained significant parliamentary oversight; the 19th Constitutional Amendment reversed most of the changes, returning the process to the plan set in the *Al-Jehad Trust* case.

military authority. The following chapter (i.e., the epilogue) of the book deals with contemporary problems faced and navigated by the judiciary, particularly the quashed presidential reference against Justice Qazi Faez Isa. Kureshi argues that a new trend seems to be emerging, one of divided benches. This, he holds, is largely because audiences have shifted again. Bar associations remain important, but so do political parties and the executive, which play an important role in legislating on judicial appointments and other matters of concern to the judiciary. Judicial alignment with this or that political faction has started playing a role in their evaluation of cases, which have increasingly started demanding adjudication on political disputes, making us witness a decisive split in benches. Also, this has cast serious doubt on the impression of judicial neutrality, and if such intervention continues, Kureshi predicts, then public faith in the judiciary will wane to the point where the judiciary is considered irrelevant.

While the book does not cover the Supreme Court (Practice and Procedure) Act, 2023, nor the Supreme Court (Practice and Procedure) Amendment Ordinance, 2024, Kureshi would undoubtedly point to conflict within the benches of the superior judiciary as a signification of this new trend. The fact of increased parliamentary intervention into judicial management has split the judiciary significantly, both formally—in judgements⁴—and informally, as there are (unverified) rumours of judges responding antagonistically to other judges’ opinions in separate cases.⁵

At the same time, Kureshi holds that the judiciary has realised it cannot afford to completely alienate the military and intelligence agencies, at least not until judges are being surveyed in their personal and professional capacities. The leaked data of the family of Justice Babar Sattar of the Islamabad High Court earlier this year is an unfortunate but accurate example in this regard.⁶ This attempt to keep skeletons in the closet hidden requires at least a working relationship with the

⁴ *Raja Amer Khan and another v. The Federation of Pakistan* 2023 SCP 310 and 2024 SCP 159 (majority and minority opinions, respectively).

⁵ Hasnaat Malik, “Ongoing tension” between CJP, Minallah intensifies’ *The Express Tribune* (Islamabad, 26 July 2024) <<https://tribune.com.pk/story/2483020/ongoing-tension-between-cjp-minallah-intensifies>> accessed 30 September 2024.

⁶ Correspondent, ‘IHC seeks X’s help in judge’s data leak’ *The Express Tribune* (Islamabad, 2 July 2024) <<https://tribune.com.pk/story/2476036/ihc-seeks-xs-help-in-judges-data-leak>> accessed 30 September 2024.

military. But this realisation has not affected significant moments of resistance. However, how far the resistance goes and whether it is replicated at all levels is questionable, especially given the arguably light and paradoxical judicial response to the letter filed by judges of the Islamabad High Court against surveillance and intelligence intrusion in their personal and professional conduct, as the matter was forwarded to the executive for inquiry.⁷

The final chapter of the book, titled ‘Conclusion and Comparative Perspectives’, looks at how the audience-based framework of analysis used in this book can be applied to other societies, such as India, Turkey, and Egypt. The case of India is significant because it has experienced the same colonialism that Pakistan has, allowing an interesting comparative-contrasting analysis. The latter two countries have had a significant military presence in the political sphere, so they share this experience with Pakistan.

In terms of the methodology of the author, some feedback may be provided. Yasser Kureshi relies primarily on his undoubtedly impressive and exhaustive analysis of Pakistani caselaw. This approach is called ‘content analysis’ and involves, to some degree, the generation of quantitative, generalisable data from qualitative heaps of information. That is precisely what Kureshi has done. Six charts of figures and ten tables have been used to support the claims made. This approach is sufficiently detailed when the question of the nature of cases is concerned; in other words, even a cursory skimming of a judgement will inform one of the parties involved and the legal questions to be adjudicated. However, where Kureshi comments on the nature of the judgements, it gets a little trickier.

For illustration, consider Table 3.5 ‘Supreme Court’s reported judgements pertaining to military prerogatives (1990-1999).’⁸ Kureshi claims that 39% of the judgements were against the military between 1990 and 1994. This figure comes from his analysis of judgements, but can a generalisable claim be made out of this kind of analysis? Moreover, there is no discussion about the degree of opposition in the judgements, nor the kind of cases that were considered. In this regard, one is forced between the rock of accepting Kureshi’s (probably but not certainly

⁷ See *In the matter of letter dated 25th March 2024 of the Six Judges of the Islamabad High Court* 2024 SCP 162.

⁸ Kureshi (n 1) 107.

accurate) claim and the hard place of rejecting his position. However, in terms of the sheer innovation of the approach, Yasser Kureshi deserves all the accolades he gets. Trends and patterns can only be identified and theorised through some input of a quantitative nature. Hopefully, the author will continue to write about these topics, so his scholarly contributions can gain depth.

Another missing element in the book was the role of the Federal Shariat Court, an institution of immense significance since its establishment in 1980. It is all the more important since any decision passed by the Federal Shariat Court and not appealed in the Shariat Appellate Bench of the Court has binding value on High Courts and all subordinate courts.⁹ To appeal a decision of the Federal Shariat Court, a special Shariat Appellate Bench of the Court was formed, where the Muslim judges of the Court barely outnumber the *ulema*.¹⁰ While the focus of the book is on the superior judiciary vis-à-vis the political setup of the country, the Federal Shariat Court could have been an important point of discussion.

For instance, the author discusses the concept of military courts and how they have been used in the past by undemocratic rulers to dilute the powers of civilian courts, while also curbing the powers of appeal of the superior judiciary. He could have easily added the example of the Federal Shariat Court, which was originally forcibly created out of thin air by General Zia's regime in a bid for Islamisation of Pakistani law, but also to create a system parallel to the High Courts and the Court. Another way in which the Federal Shariat Court could have been introduced in the discussion was regarding petitions. Article 203-D(1) of the Constitution clearly allows the Federal Shariat Court to take up cases on petition or *suo motu* on the ambiguous criteria of conformity with Islam.¹¹ Judges of the Federal Shariat Court could have, therefore, challenged military rule on the basis of its non-conformity with Islam, but their unwillingness or inability to do so is neither explained nor described in the book. Unfortunately, this is a gaping hole in what is otherwise an excellent analysis of the behaviour of the superior judiciary vis-à-vis other state institutions.

⁹ The Constitution of the Islamic Republic of Pakistan 1973, art 203GG.

¹⁰ Constitution (n 9) art 203F.

¹¹ *Suo motu* powers were granted to the Federal Shariat Court by the Constitution (Second Amendment) Order 1982, art 4.

Similarly, the question of legal education seems inadequately answered by the author. This is a significant issue because the disparity between the legal education in the West and in Pakistan is one of the foundational premises utilised by the author in arguing for the 'audience-based framework'. Most of the sources claiming this disparity are interviews with judges or lawyers, who remain anonymous. Even if one accepts the views of active members in the legal community as valid sources of academic work (which should not be taken for granted, least of all on questions of legal education, since they may not have a fuller appreciation for both systems of education), it remains the case that statements or claims by judges and lawyers are taken at face value. One would find these to be increasingly unreliable when one considers the intricacies of bar politics, a concept the author acknowledges as well.

The fact that bar councils and bar associations have a stake in certifying law colleges as valid institutions makes this issue more problematic. Why would lawyers, potentially working closely with legal education committees in bar councils and bar associations, speak of local law colleges as inferior when it may be their job to maintain the academic standards of those very institutions? In the absence of information on the interviewees, one can only hope that the author took these factors into consideration when planning his research. The same problem can be said to apply to judges who were interviewed, considering most of them were former lawyers as well. In sum, the question of legal education in the West (which the author claims to be more procedural) and in Pakistan (which supposedly is more outcome-based) needs to be understood carefully before any generalisable claim is made, creating a hierarchy in legal knowledge. These are crucial practical questions that every law student and lawyer will have to deal with on a routine basis.

It is contended that such claims be limited to theoretical models, which retain the capacity for exceptions, instead of implying that Pakistan-trained judges are more concerned with the final result than with the procedure. If such a claim is to be made, it needs to be backed with clear evidence that is not at risk of being twisted and cut in a manner that it fits into generalisable, quantitative models. For example, judgements written by Western- and Pakistan-trained judges could be compared, and the author must assume the responsibility for proving that they are qualitatively different from each other. But even that kind of analysis might not be

what it would purport to be; after all, can a judgement's quality be measured through its usage of the English language?

These observations do not take away from the tremendous scholarly input provided by Yasser Kureshi, a rising academic who has contributed immensely to our understanding of the roles and behaviours of the superior judiciary in Pakistan. It is an excitingly valuable manual to help us become attentive viewers to the Pakistani judiciary as it navigates perilous waters for the umpteenth time in the country's brief national history. Other literature on this topic is highly anecdotal and personal, which, though beneficial to our understanding, lacks the hardcore, data-driven, and generalisable analysis that comes to us from Yasser Kureshi. It is also often an issue with other books on the subject that they comment in isolated silos, simply unable to keep track with other books describing similar facts or updated theorisation. Kureshi's work, in increasingly sharp contrast, builds on a highly sophisticated survey analysis of theoretical models on judicial institutions such as ours. In that sense, it is much more academic but astonishingly, through its style and general subject matter, retains its readability for the lay reader. Thus, this is clearly the work of an accomplished historian and legal academic who deserves our commendations on this outstanding book.

Conclusion

Yasser Kureshi's *Seeking Supremacy* is a groundbreaking contribution to the study of judicial politics in Pakistan. Through a rigorous, theory-driven yet accessible narrative, Kureshi deftly charts the shifting power dynamics between the judiciary, the military, and the legal community. His 'audience-based framework' offers an original and compelling lens to interpret the evolving behaviour of Pakistan's superior judiciary—one that transcends simplistic binaries of subservience and defiance. Despite certain omissions—such as the underexplored role of the Federal Shariat Court and the need for deeper empirical grounding of claims about legal education—Kureshi's work remains a landmark intervention.

The book's combination of archival research, content analysis, and comparative insight sets it apart from more anecdotal or ideologically slanted accounts of Pakistan's legal evolution. It captures not just institutional shifts but also the professional and political anxieties underlying judicial conduct in a fragile

democracy. For scholars, practitioners, and students of constitutionalism, South Asian politics, and judicial power, *Seeking Supremacy* is essential reading. It does not merely recount history—it gives us a vocabulary and framework to understand the judiciary's complex and contested journey towards institutional supremacy in Pakistan.