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What's in a Founding? *Founding Moments and Pakistan's 'Permanent Constitution' of 1973*

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[W]hen we devoted ourselves to the task of making the Constitution, we resolved that we shall give a Constitution ... which shall have its roots firmly in the people of Pakistan so that no matter what a convulsion you get, no matter what earthquake you get, no matter how many dictators you bring in, you will not be able to dislodge democratic institutions from this country.²

For Pakistan, as for India, decolonisation and the accompanying partition of the Subcontinent in 1947 were cataclysmic transformations. For both states, independence was a 'constitutive' or 'founding moment'.³ But while India was successful in making a constitution in 1950, Pakistan descended into a constitutional impasse. And while India's founding, despite the heavily elite-driven process of constitution-making, has been commemorated as a 'people's constitution' because of its historical premise in the freedom movement against British colonial rule,⁴ Pakistan has attracted epithets like a 'vice-regal system',⁵ 'constitutional autocracy',⁶ 'military-bureaucratic oligarchy'⁷ and 'praetorian democracy'⁸

¹ I would like to express my gratitude for the continuous and generous support of my colleagues at the Institute of Development and Economic Alternatives (IDEAS) in Pakistan, especially Osama Siddique, Faisal Bari and Rabea Malik, who engaged in impromptu discussions on this work on several occasions. Thank you also to the South Asia Legal Studies Working Group at the University of Wisconsin Law School for their critical input on an earlier draft.

² Abdul Hafeez Pirzada, Chairman of the Constitution Committee, Official Report of the Second Session of the National Assembly of Pakistan (Constitution-Making) Debates (1972) 11(1), 4.

³ Ted Svensson, *Production of Post-colonial India and Pakistan: Meanings of Partition* (Routledge, 2013) 28–29.

⁴ Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, 2nd edn (Oxford University Press, 1999); Arvind Elangovan, 'The Making of the Indian Constitution: A Case for a Non-nationalist Approach' (2014) 12(1) *History Compass* 1, 1.

⁵ GW Choudhury, 'Democracy on Trial in Pakistan' (1963) 17(1) *Middle East Journal* 1.

⁶ Khalid Bin Sayeed, 'Pakistan's Constitutional Autocracy' (1963–64) 36(4) *Pacific Affairs* 365.

⁷ Hamza Alavi, 'The State in Post-colonial Societies: Pakistan and Bangladesh' (1972) 74 *New Left Review* 59.

⁸ Hassan Nawaz Gardezi and Jamal Rashid (eds), *Pakistan, The Roots of Dictatorship: The Political Economy of a Praetorian State* (Zed Press, 1983).

because of its abortive experiments with constitutional change. In this discursive milieu, the towering and revered historical figure of Muhammad Ali Jinnah – the founder of Pakistan and a constitutional lawyer himself – personifies a deeply idealised but unfulfilled vision of Pakistani identity that continues to grip the collective imagination. Not unlike the popular appropriation of founding visions elsewhere, the refrain of ‘Jinnah’s Pakistan’⁹ finds traction across the socio-political spectrum, from those espousing an Islamic state¹⁰ to those arguing for a secular and pluralist state.¹¹

Amid the din of competing visions of Jinnah’s Pakistan, the despair of a lost founding, the nostalgia for Jinnah and his principled constitutional politics, and the hope for a revival of Jinnah’s vision in the future, there is little scholarly recognition of the current constitutional framework of the country: namely, the Constitution of 1973. Despite being a watershed historical event, the making of the 1973 Constitution remains chronically understudied almost half a century later. The period of constitution-making between 1968 and 1973 was tumultuous, yet one of constitutional trailblazing. This was a time when a countrywide social movement brought down the first military dictator;¹² when the country held its first democratic elections based on adult universal franchise;¹³ when it experienced the shock of civil war and lost more than half its population with the partition of East Pakistan;¹⁴ when elected leaders first took the reins of government;¹⁵ and when a constitution was drafted for the first time by an elected constituent assembly.¹⁶ The lack of attention to the 1973 Constitution is partially a result of the impoverished state of scholarship among lawyers and legal historians in the region. More importantly, it is a result of the cyclical de-legitimation of democratic politics – and, with it, the 1973 Constitution – by the military governments of General Zia (1977–88) and General Musharraf (1999–2008). These and other political upheavals have led many to be deeply critical, even cynical, about the legitimacy, utility and relevance of the Constitution to democratic norm-building.¹⁷

⁹Martin Lau, ‘Islam and the Constitutional Foundations of Pakistan’ in Rainer Grote and Tilmann J. Roder (eds), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford University Press, 2012); Safdar Mahmood, ‘Jinnah’s Vision of Pakistan’ (2002) 23(1) *Pakistan Journal of History and Culture* 39.

¹⁰Hasan Askari Rizvi, ‘Jinnah, Islam and the Political System’ *Dawn* (25 December 2014), www.dawn.com/news/1153119.

¹¹Syed Jaffar Ahmed, ‘Jinnah and the Notion of a Nation-State’ (2011) 16(1) *Pakistan Perspectives* 29; Barbara D Metcalf, *Islamic Contestations: Essays on Muslims in India and Pakistan* (Oxford University Press, 2004); Lawrence Ziring, ‘Pakistan: The Vision and the Reality’ (1977) 4(6) *Asian Affairs* 385.

¹²Shahid Javed Burki, ‘Ayub’s Fall: A Socio-economic Explanation’ (1972) 12(3) *Asian Survey* 201.

¹³Craig Baxter, ‘Pakistan Votes – 1970’ (1971) 11(3) *Asian Survey* 197.

¹⁴Richard Sisson and Leo E Rose, *War and Secession: Pakistan, India, and the Creation of Bangladesh* (University of California Press, 1991).

¹⁵Robert La Porte, Jr, ‘Pakistan in 1972: Picking up the Pieces’ (1973) 13(2) *Asian Survey* 187.

¹⁶GW Choudhury, ‘“New” Pakistan’s Constitution, 1973’ (1974) 28(1) *Middle East Journal* 10.

¹⁷Zulfikar Khalid Maluka, *The Myth of Constitutionalism in Pakistan* (Oxford University Press, 1995); AG Noorani, ‘Secular Jinnah and the Islamic Undercurrent’ (2012) 6(3) *Criterion Quarterly*, www.criterion-quarterly.com/secular-jinnah-the-islamic-undercurrent; Ardeshir Cowasjee, ‘Bring Back Jinnah’s Pakistan’ *Dawn* (1 November 2009), www.dawn.com/news/499938.

Hence, it is with some trepidation that I set myself to what seems like an intellectually daunting task: envisioning the constitutional bargain underlying the 1973 Constitution as a founding moment of constitutionalism in Pakistan. This chapter advances the argument that the creation of the 'permanent' Constitution of 1973 is central to Pakistan's constitutional identity. I make this claim notwithstanding the failure attributed to the 1973 Constitution in forestalling military coups,¹⁸ the repeated 'suspension' of the Constitution and its bill of rights,¹⁹ and the many 'constitutional deviations' introduced into the Constitution by dictators.²⁰

The 1973 Constitution is Pakistan's only surviving constitutional settlement that is both democratic in its origins and has the imprimatur of being a 'consensus constitution' in an otherwise divisive political context.²¹ Moreover, it is on the pivot of this Constitution that diverse constituencies in support of democracy and constitutional rights have emerged over the past four decades. The Constitution is the symbolic anchor for the survival and self-perpetuation of democratic political parties.²² It is also the source of a uniquely South Asian constitutional rights jurisprudence, known as 'public interest litigation' (PIL), which has enabled a wide array of constituencies – involving citizen groups and non-governmental organisations, the media, government employees, lawyers, politicians and political parties – to engage with and construct a rights-based discourse through the courts.²³ Furthermore, it is the normative framework from which the judiciary – one of the most politically interventionist in the world – derives its powers of judicial review.²⁴

The 1973 Constitution acquires legitimacy as the founding moment from factors that are grounded both in the past and in the present. They include the historic political conditions of the birth of the Constitution; a broad identification with the Constitution at the time of its making; evolving political support for the Constitution over time; mobilisation around the Constitution for political resistance through constitutional means; and a reconstruction of the current political system on the substratum of the original Constitution. Accordingly, I argue that the Constitution must be judged not on the basis of its substantive flaws or historical failures, or on the basis of continuing impediments or challenges to constitutionalism. Instead, it ought to be appraised on the basis of its instrumental value in

¹⁸ Osama Siddique, 'The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents' (2006) 23(3) *Arizona Journal of International and Comparative Law* 615, 623.

¹⁹ Imtiaz Omar, *Emergency Powers and the Courts in India and Pakistan* (Kluwer Law International, 2002) 81–82.

²⁰ Maryam S Khan, 'Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization' (2014) 28 *Temple International and Comparative Law Journal* 284, 302–03, 316–17.

²¹ Paula R Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge South Asian Studies, 1995) 138–140.

²² Leo E Rose and D Hugh Evans, 'Pakistan's Enduring Experiment' (1997) 8(1) *Journal of Democracy* 83.

²³ Khan (n 20).

²⁴ *ibid.*

enabling and expanding constituencies for constitutional transformation and sustaining opposition to 'extra-constitutional' interventions.²⁵ In other words, the 1973 Constitution is a central arena for pro-democracy groups and rights activists to assert their constitutional rights and 'to devise instruments of empowerment to strengthen their endeavours'.²⁶ It is in this consequentialist sense that the 1973 Constitution is a founding moment in Pakistan. This consequentialist understanding does not negate some very valid criticisms of the Constitution and the politics around it; rather, it underlines the need for continuing and strategic engagement with the political process for entrenching constitutional norms.

This conceptualisation deliberately deviates from the idealised eighteenth-century Western European notion of a founding moment as an immediate and radical break with the *ancien régime*.²⁷ It also departs from normative characterisations of the American founding as higher law-making that takes place outside the regular constitutional process through the intense participation and deliberation of the people.²⁸ Not only are these traditional formulations of founding moments the subject of mounting critique in their own contexts, using them as yardsticks for constitutional norm-building in present-day post-colonial societies is both misconceived and counter-productive.²⁹ The alternative notion of a founding moment I propose is 'instrumental' (as opposed to self-enforcing), 'resurgent' (as opposed to entrenched) and 'negotiated' (as opposed to populist). This calls for a reflexive relation between models of constitution-making and political and historical conditions.³⁰ Indeed, viewed on a wider scale, a constitutional framework that accumulates legitimacy over time through periodic resurgence allows for the articulation of a more typical present-day political model for rethinking founding moments.³¹ It is to this end – to engage with a political model on founding moments that has resonance with many contemporary states in political transition – that I use Pakistan's example as broadly illustrative. I remain cognisant that this is only one amongst a plurality of observable processes of constitutional origination.

The chapter is structured as follows. Section I outlines the original 1973 Constitution and its prominent features within a historical framework of inquiry. Section II shifts the focus from the textual to the conceptual. It makes the fundamental argument that the 1973 Constitution is a founding moment

²⁵ Tayyab Mahmud, 'Praetorianism and Common Law in Post-colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan' (1993) 4 *Utah Law Review* 1225.

²⁶ Rajeev Dhavan, 'The Constitution as the Situs of Struggle: India's Constitution Forty Years on' in LW Beer (ed), *Constitutional Systems in Late Twentieth Century Asia* (University of Washington Press, 1992).

²⁷ Andrew Arato, 'Forms of Constitution Making and Theories of Democracy' (1995) 17 *Cardozo Law Review* 191, 207.

²⁸ Bruce Ackerman, *We the People: Transformations* (Belknap Press, 2000).

²⁹ Arato (n 27) 211.

³⁰ *ibid* 219.

³¹ Vicki C Jackson, 'What's in a Name? Reflections on Timing, Naming, and Constitution-Making' (2008) 49(4) *William & Mary Law Review* 1249.

in constitutionalism. In making this argument, section II attempts to situate Pakistan's trajectory within a scholarly framework of political and constitutional development, and lays out the contours of a founding model of 'resurgent constitutionalism' in similar contexts. It puts forward two essential elements of a founding moment – namely, the *ex ante* conditions of constitution-making and the *ex post* endurance of a constitution – and reflects on how Pakistan's historical experience is important for thinking about founding moments generally. Section III presents a historical analysis of constitution-making in Pakistan to illustrate the *ex ante* and *ex post* elements of its founding moment.³² On a more general level, it reinforces the double-barrelled quality of a founding moment as both a watershed historical event and a process of constitutional consolidation. Section IV offers some concluding thoughts on theorising resurgent constitutionalism in transitional contexts.

I. Pakistan's 'Permanent Constitution': Historical Antecedents and Original Framework

This section presents a discussion of the historical antecedents of the 1973 Constitution. It looks at the constitutional frameworks that preceded the Constitution and the major contestations involved in their making. It then locates the original framework of the 1973 Constitution within this historical context.

Prior to the 1973 Constitution, Pakistan was governed by a number of different constitutional frameworks. Interim arrangements aside, the three main constitutions were the Government of India Act of 1935 (hereinafter the '1935 Act'), the last pre-independence constitution of British colonial India;³³ the Constitution of 1956; and the Constitution of 1962. The 1935 Act was adopted with some modifications as the post-independence constitution pending a new indigenous constitution. The 1956 Constitution was the first 'permanent constitution' to be promulgated by a constituent assembly, only to be abrogated in 1958 in a military coup.³⁴ The 1962 Constitution was introduced after an interregnum of four years by the same military government that abrogated the 1956 Constitution, but suffered a similar fate when it was abrogated in 1969 by a succeeding military regime.³⁵ Two interim constitutional frameworks followed, eventually to be replaced by the 1973 Constitution.

Thus, Pakistan's constitutional journey, like India's, began with the 1935 Act, a colonial system of 'bureaucratic despotism' designed for centralised control over

³²I borrow this nomenclature from Jon Elster, 'Arguing and Bargaining in Two Constituent Assemblies' (2000) 2 *University of Pennsylvania Journal of Constitutional Law* 345, 356.

³³Lau (n 9) 171.

³⁴Wayne A Wilcox, 'The Pakistan Coup d'Etat of 1958' (1965) 38 *Pacific Affairs* 142.

³⁵KJ Newman, 'The Constitutional Evolution of Pakistan' (1962) 38 *International Affairs* 352.

the native Indian population.³⁶ Among its main features was the concentration of executive powers in the office of the Governor General and a centralised judicial system, which was an integral component of the coercive apparatus of the colonial state.³⁷ While India's Constitution of 1950 was also a modulated form of the 1935 Act,³⁸ various factors at the time of partition led to divergent legacies of the 1935 Act in Pakistan. The 1935 Act amplified the political power of the executive-dominated state bureaucracy over other civilian institutions in Pakistan, including the nascent founding political party, the Muslim League.³⁹ The historical conditions that led to the rise of the 'over-developed bureaucratic state'⁴⁰ included severe resource constraints, a refugee settlement process of gargantuan proportions, the battle over the accession of princely states and other territories, a preoccupation with state-building and national security, and the de-prioritisation of strong representative institutions.⁴¹ It was in these extraordinary conditions that the first Constituent Assembly of Pakistan – elected through provincial legislatures in the year prior to independence and a rump of the Constituent Assembly of India – was expected to draft a new constitution in addition to acting as the central legislature.

Quite apart from the Governor General's powers, the civil and military elite's resistance to democratisation, and the unravelling contestations between the centre and the provinces, there were two other structural constraints that contributed to thwarting early constitution-making efforts. The first of these was the struggle between secularists and Islamic modernists, and a heterogeneous set of Islamist pressure groups with varying demands for an Islamic constitution, leading to a complex process of accommodation. The second was an ethnically defined geographical divide, which was unprecedented in modern state-formation. At the time of partition, Pakistan comprised two 'wings', East and West, separated by more than 1,000 miles of hostile Indian territory. East Bengal or East Pakistan – situated on the eastern tip of the Indian Subcontinent – was its largest province, consisting of well over half the country's total population.⁴² Added to their physical isolation was the fact that the Bengalis in the East, despite being the largest indigenous and regionally discrete ethnic group in Pakistan, were discriminated against in the upper levels of the bureaucracy and military, and had virtually

³⁶ David Washbrook, 'Law, State and Agrarian Society in Colonial India' (1981) 15(13) *Modern Asian Studies* 649.

³⁷ *ibid.*

³⁸ Surya Deva, 'The Indian Constitution in the Twenty-First Century: The Continuing Quest for Empowerment, Good Governance and Sustainability' in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014) 346.

³⁹ Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (Cambridge University Press, 1985).

⁴⁰ Alavi (n 7).

⁴¹ Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defence*, 2nd edn (Vanguard Books, 1991).

⁴² Rounaq Jahan, *Pakistan: A Failure in National Integration* (Columbia University Press, 1972).

no control over their industry and commerce.⁴³ The reluctance of the bureaucratic leadership in West Pakistan to strike a fair constitutional agreement with East Pakistan was premised on a fear of the latter's numerical dominance.⁴⁴ Hence, for the first decade, Pakistan was embroiled in a constitutional stalemate. It was only in 1955 that the elites from both wings reached a constitutional bargain, albeit in the larger context of a rapidly worsening civil–military imbalance.⁴⁵

The 1956 Constitution emerged from this elite bargain, which was made possible only after the Constituent Assembly was dissolved and reconstituted by the Governor General.⁴⁶ Its central feature was a system of East–West representational parity, with seats in a unicameral central legislature apportioned equally between the two wings. In West Pakistan, this necessitated the dissolution of its provincial territories into a single political unit, known as the 'One Unit' – a measure that was steamrolled against the backdrop of opposition from the smaller provinces.⁴⁷ As regards the agreement on the role of Islam, the 1956 Constitution declared Pakistan an 'Islamic Republic', making it one of the first post-colonial 'Islamic States' in the world. In addition, the Constitution adopted as its Preamble the 'Objectives Resolution', a constitutional blueprint dating back to 1949 which struck an uneasy compromise between a liberal democratic framework and Islamic principles.⁴⁸

The 1956 Constitution was short-lived. The new military regime of General Ayub Khan that took over power in a coup in 1958 abrogated the Constitution.⁴⁹ The main motivation for the coup was the unpalatable prospect of popular elections.⁵⁰ After four years of martial law, Ayub Khan introduced the 1962 Constitution, professing that it was more in line with the 'genius of the people'.⁵¹ The 1962 Constitution reverted to an executive-dominated government, but at the same time attempted to construct a more secular vision of Pakistan by omitting the reference to an Islamic state and other Islam-based provisions. However, reactionary responses from *ulema* (Islamic scholars) 'to make the constitution visibly Islamic' led to the re-insertion, only a year later, of most Islamic provisions contained in the 1956 Constitution.⁵² In 1969, Ayub Khan was forced to resign following a massive social movement,⁵³ paving the way for the country's first democratic transition.

⁴³ Philip Oldenburg '“A Place Insufficiently Imagined”: Language, Belief, and the Pakistan Crisis of 1971' (1985) 44 *Journal of Asian Studies* 711, 711–12.

⁴⁴ Yunus Samad, *A Nation in Turmoil: Nationalism and Ethnicity in Pakistan, 1937–58* (Sage, 1995) 194.

⁴⁵ Jalal (n 41).

⁴⁶ *ibid* 196–215.

⁴⁷ *ibid*.

⁴⁸ Leonard Binder, *Religion and Politics in Pakistan* (University of California Press, 1963) 142–54.

⁴⁹ Ayesha Jalal, *Democracy and Authoritarianism in South Asia: A Comparative and Historical Perspective* (Cambridge University Press, 1995) 56–59.

⁵⁰ Newman (n 35).

⁵¹ GW Choudhury (ed), *Documents and Speeches on the Constitution of Pakistan* (Green Book House, 1967) 560.

⁵² Lau (n 9) 194.

⁵³ Tariq Ali, *Pakistan: Military Rule or People's Power?* (W Morrow, 1970).

The hegemony of the ‘military-bureaucratic complex’ and the oscillation between civilian and military governments have been central to constitution-making in Pakistan. But much as military regimes have been at the forefront of constitutional engineering since the 1950s, there have been three major fault lines in constitution-making experiments across time, whether imposed by military regimes or produced by democratic governments. These are: the design of the centre and its institutions; the division of power between the centre and provinces; and the demarcation of the role of Islam in the state. I analyse the original 1973 Constitution from the perspective of these focal contestations and the extent to which the new Constitution departed from historical settlements on these issues.

A. The Centre

Like the Indian Constitution, the 1973 Constitution is a lengthy and descriptive document that encompasses both the general outlines and administrative minutiae of government.⁵⁴ The ‘core ingredients’ of the original Constitution included a bill of rights and a ‘power map’⁵⁵ establishing a democratic government based on a federal parliamentary form of government and an independent judiciary with express judicial review powers.

The parliamentary form of government in the new Constitution consisted of a titular President, a cabinet and an indirectly elected prime minister as the executive.⁵⁶ It stood apart in many ways from previous constitutions. The 1956 Constitution was essentially a cosmetic variation on the 1935 Act as it vested executive authority in a president, with discretionary powers to appoint and remove the prime minister.⁵⁷ The 1962 Constitution, on the other hand, made no pretences about military authoritarianism – it was described as a ‘Presidential Cabinet without a Prime Minister’.⁵⁸ The 1973 Constitution overcorrected for the historical president–prime minister imbalance by granting the prime minister special powers over both the president and the parliament.⁵⁹

The bill of rights, known as ‘Fundamental Rights’, contained the full spectrum of rights ranging from civil and political rights, socio-economic rights relating to property and work, and collective rights like non-discrimination in respect of religion, access to public places and public employment (Articles 9–28). The Fundamental Rights were directly enforceable by the provincial high courts

⁵⁴ The original Indian Constitution of 1950, one of the lengthiest constitutional texts in the world, contained 315 articles and eight schedules. In comparison, the original 1973 Constitution comprised 280 articles and four schedules.

⁵⁵ Ivo D Duchacek, *Power Maps: Comparative Politics of Constitutions* (ABC-Clio, 1973) 3.

⁵⁶ Baxter (n 13).

⁵⁷ GW Choudhury, ‘The Constitution of Pakistan’ (1956) 29(3) *Pacific Affairs* 243.

⁵⁸ Newman (n 35).

⁵⁹ Baxter (n 13) 1083–84.

and a centralised apex Supreme Court.⁶⁰ These 'Constitutional Courts' were endowed with a special 'original jurisdiction' with expansive remedial powers for the enforcement of the Fundamental Rights (Article 184(3)). The Constitution expressly provided that laws that were inconsistent with or made in derogation of the Fundamental Rights were void (Article 8). The combination of judicial power and the Fundamental Rights contained in the 1973 Constitution was unprecedented. The 1935 Act had no bill of rights and only limited judicial review powers. The 1956 Constitution had a similar framework, but was aborted before it could be implemented. The original 1962 Constitution lacked an enforceable bill of rights.

Overall, the design of the cabinet government in the 1973 Constitution departed fundamentally from historical constitutional frameworks in Pakistan. While the inclusion of strong-form judicial review was ostensibly a check on parliamentary authority, the hyper-powers of the prime minister granted him and his cabinet a fair amount of autonomy from the legislature, making his position more akin to the executive in a presidential form of government. Moreover, some of the powers of the National Assembly – the directly elected lower house to which the prime minister was responsible – were made subject to checks by the Senate, an indirectly elected upper house. Thus, the broader structure of the government looked more like a subtype of the separation of powers system with a federal bicameral legislature subject to constitutional review.

B. Centre–Province Relations and Provincial Autonomy

The 1973 Constitution introduced important innovations in federal design. The 1935 Act had proposed a conditional formula for the federalisation of Indian territories that did not materialise under colonial rule. At partition, the pre-independence demarcation of subterritories carried over into the new state of Pakistan. However, the 1956 Constitution eliminated all internal boundaries in the West wing through the 'One Unit' plan because of the East–West stalemate over the federal question. The 1962 Constitution left this One Unit structure and East–West parity intact.⁶¹ Thus, both the 1956 and 1962 Constitutions suppressed regional territories in the West to create a 'bipolar federation'.⁶²

The 1973 Constitution embodied a number of historic firsts for centre–region relations. One of these was the disbanding of the One Unit and recognition of the four main regions – Punjab, Sindh, North-West Frontier Province (now Khyber Pakhtunkhwa) and Balochistan – as de jure ethnic identity-based sub-units with their own provincial governments and law-making powers. This was in direct

⁶⁰ Khan (n 20) 297–300.

⁶¹ *ibid* 100.

⁶² Maryam S Khan, 'Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-linguistic Identity and Group Conflict' (2014) 30 *Harvard Journal on Racial and Ethnic Justice* 77, 98–100.

response to historical demands for the constitutional recognition of minority regions and ethnic groups that were otherwise dominated by the disproportionately large and historically powerful province of Punjab.⁶³ Another innovation was the establishment of the Senate, a federalist body for the equal representation of the provinces at the centre.

In sum, a number of political demands put forth by democratic constituencies since independence finally found expression in the 1973 Constitution. The adoption of a parliamentary system, accommodation of an ethno-regional federal structure with a bicameral central legislature and a re-distribution of power through provincial autonomy all reflected a political reversal on heated questions that had eluded past constitution-makers. That this agreement came after much acrimonious contestation between the majority party and smaller regional parties, or that it did not go far enough in accommodating minority interests, or that its full implementation was hamstrung by the majority party, or that it was suspended by a dictator shortly after its making, does not take away from the singular achievement of making a 'permanent constitution' through a democratic process in a historical context of constitutional impasse and authoritarian government for almost a quarter of a century.

C. Religion and State

The original 1973 Constitution, like most other post-war constitutions, combined elements of history, ideology and culture. It was also distinctive in that it was an 'Islamic Constitution', though it closely resembled its predecessors. Indeed, the Preamble was a verbatim reproduction of the Objectives Resolution and, as such, reflected a continuity in political demands since independence for an Islamic constitution. The incongruities between Islam and liberal notions of constitutionalism thus carried over to the 1973 Constitution. The Constitution contained other Islamic provisions as well. These included a preambular declaration that 'Muslims shall be enabled to order their lives ... in accordance with the teachings and requirements of Islam' (Preamble), along with a set of provisions deriving from this declaration; a provision mandating that the head of state be Muslim (Article 41(2)); and a non-justiciable 'repugnancy clause' declaring that 'no law shall be enacted which is repugnant to such [Islamic] Injunctions' (Article 227(1)) and establishing an advisory body for making recommendations to the parliament on whether a proposed law was repugnant (Article 228). The 1956 and 1962 Constitutions contained these provisions in broadly similar terms.⁶⁴ The only

⁶³ *ibid* 111–13.

⁶⁴ Said Amir Arjomand, 'Religion and Constitutionalism in Western History and in Modern Iran and Pakistan' in Said Amir Arjomand (ed), *The Political Dimensions of Religion* (State University of New York Press, 1993) 89–90.

major addition in the 1973 Constitution was a kind of 'establishment clause' that made Islam the 'State religion of Pakistan' (Article 2).⁶⁵

At the same time, the 1973 Constitution was unique in the degree to which Islamic principles were merged with, and in many ways made contingent on, a progressive framework for socio-economic re-structuring. The progressive character of the Constitution was a novelty, particularly its recognition of labour rights, commitment to a broadening of the economic base, latitude in allowing for an expanded role for the state in regulating private wealth and unprecedented focus on securing gender equality. Thus, although the broad 'legitimizing principle'⁶⁶ of the new political order was Islamic ideology, the latter was ostensibly a progressive vision of Islam centred on 'an egalitarian society' (Preamble). The merger of an Islamic state with progressivist ideals was most evident in the chapter on 'Principles of Policy', which laid out a prescriptive policy schema for guiding executive and legislative functions (Chapter 2). On the one hand, the Principles iterated the state's role in enabling 'the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam' (Article 31(1)). On the other hand, they read like a socialist charter, directing the state to safeguard the rights and secure greater public participation of vulnerable and marginalised groups (Articles 32–39); to promote social justice through special treatment of 'backward classes and areas', inclusive education reform, inexpensive and expeditious justice delivery, and improved working conditions and benefits for the working classes (Article 37); and to ensure social and economic well-being through the provision of basic necessities of life and equal opportunities, and the reduction of income and wealth disparities (Article 38). The Constitution contained other socialist provisions as well, including reserved parliamentary powers to alter property relations through land reform and to nationalise private industry and business (Article 253). Thus, in many respects, the Constitution was not unlike other post-colonial Asian constitutions in their detailed references to socio-economic structures and promotion of a welfare state.⁶⁷

Against this backdrop, the question arises as to how the 1973 Constitution has stimulated change in the political trajectory of Pakistan. Appreciating the lived utility of a constitution requires more than an understanding of its substantive qualities; it requires a long-range view of constitutional contestation and transformation in practice. Loewenstein's appraisal of constitutions on the basis of their impact is highly relevant in this regard.⁶⁸ Loewenstein argues that constitutions may be 'normative' (in which political process conforms to the constitutional

⁶⁵ Lau (n 9) 199.

⁶⁶ Dieter F Grimm, 'Types of Constitutions' in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2002) 114.

⁶⁷ Brian Beddie, 'Issues and Problems in Asian Politics and Government' in RN Spann (ed), *Constitutionalism in Asia* (Asia Publishing House, 1963) 242–43.

⁶⁸ Karl Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press, 1957).

framework), ‘nominal’ (in which power structures are in conflict with constitutional norms and render them ineffective) or ‘semantic’ (in which the constitutional text describes the existing system of government without imposing binding rules on it).⁶⁹ Loewenstein’s typology is dynamic as it emphasises the degree to which political reality conforms to the norms of a constitution at a given point in time. It explicitly recognises that the meaning of constitutions is contingent on political environments in which they are embedded and that constitutions are thus evolving political documents. In Loewenstein’s terms, the original 1973 Constitution is a case of a nominal constitution. It is not a case of a failed or aborted constitution like the 1956 Constitution or of a semantic constitution like the 1962 Constitution. Conceptualising the 1973 Constitution as a nominal constitution does not gloss over its many flaws, nor does it reduce these flaws to the problem only of under-enforcement. On the contrary, it makes it possible to engage, simultaneously, with the utility of imperfect constitutions as sites of struggle and contestation, and the normative value of constitutionalism.

The following section outlines a theoretical framework for understanding the 1973 Constitution as a model of resurgent constitutionalism in which a ‘nominal’ constitution may evolve into a ‘normative’ constitution over time.⁷⁰

II. Founding Moments and Resurgent Constitutionalism: The Case of Pakistan

The 1973 Constitution emerged from Pakistan’s first democratic transition. This was a period of global movement towards democratisation,⁷¹ but like many other newcomers to democracy, Pakistan slid back into authoritarian rule in a ‘reverse wave’ in less than a decade.⁷² Having come into effect as a permanent constitution, the 1973 Constitution was ‘suspended’ multiple times by military dictators and subsequently amended to legitimate their de facto powers. In 1977, the notorious coup-maker General Zia-ul-Haq suspended the Constitution and imposed martial law on the pretext of organising fresh elections.⁷³ The promise of elections was a political ruse, and the Constitution remained in cold storage for several years. Zia eventually ‘revived’ the Constitution in 1985, but only after unilaterally re-structuring government and centre–province relations. One of Zia’s damaging amendments has acquired a nomenclature of its own and refers to the autarchic

⁶⁹ *ibid* 147–50.

⁷⁰ *ibid* 149.

⁷¹ Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1993).

⁷² *ibid*.

⁷³ Omar Noman, *The Political Economy of Pakistan 1947–85* (Routledge 1988) 122.

powers of the President to unilaterally dissolve elected governments.⁷⁴ Known as 'Article 58(2)(b)', the amendment was intended for subordinating civilian powers to the military executive. It was emulated as a model of presidential government in the early 2000s by another military autocrat, General Pervez Musharraf, who relied on the precedent set by Zia to suspend the Constitution, subvert the judicial process for regime legitimation and subsequently revive the Constitution in a substantially altered form.⁷⁵ Ironically, however, the transitional decade between the military regimes of Zia and Musharraf bore the heaviest brunt of Article 58(2)(b). The dissolution of three popularly elected governments in quick succession between 1988 and 1997⁷⁶ demonstrated the monumental impediments in rolling back military-imposed changes to the Constitution. In the first three decades of the Constitution's existence – from the time it was enacted to the time it was revived by General Musharraf in 2002 – it was largely in a state of suspension for, cumulatively, a decade (1977–85 and 1999–2002), and in a state of constitutional deviation for another two decades (1973–77 and 1985–99).

Thus, the life cycle of the 1973 Constitution has been 'nonlinear, fitful, ambiguous and protracted.'⁷⁷ Kalhan's study of Pakistan's constitutional politics is a step in the right direction for understanding the phenomenon of constitutional evolution in a wider post-colonial context. Kalhan argues that Pakistan is an example of 'gray zone constitutionalism', in which the military engages in a 'recurring, iterative process of *transformative preservation*, by which its own power and that of its affiliated interests have been extended and entrenched into periods of civilian rule.'⁷⁸ Far from being a condition peculiar to Pakistan, this 'gray zone' is common to a large number of states undergoing political transition. Political scientists have persuasively demonstrated the non-linearity of the democratisation process since the 1970s, and the complex path dependencies and local contexts that ultimately shape this process. For instance, Carothers notes that many 'transitional countries' have entered a 'political gray zone', in that they are 'neither dictatorial nor clearly headed toward democracy.'⁷⁹ Similarly, Diamond refers to the 'democracy rollback', noting a widespread phenomenon in relatively new democracies of a reversal in the initial gains towards democratisation.⁸⁰ Diamond's data also show an 'unprecedented growth' since the 1970s in 'hybrid regimes', namely those that are 'neither clearly democratic nor conventionally authoritarian.'⁸¹ Constitution-making in 'gray zones' and 'hybrid regimes' is thus inherently complicated and does not fit neatly into well-defined temporalities.

⁷⁴ Siddique (n 18).

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ Anil Kalhan, "Gray Zone" Constitutionalism and the Dilemma of Judicial Independence in Pakistan' (2013) 46(1) *Vanderbilt Journal of Transnational Law* 4.

⁷⁸ *ibid.* 10.

⁷⁹ Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13(1) *Journal of Democracy* 9.

⁸⁰ Larry Jay Diamond, 'Thinking about Hybrid Regimes' (2002) 13(2) *Journal of Democracy* 21.

⁸¹ *ibid.* 25.

There is, of course, a great deal of pessimism about the democratisation potential of grey zones and hybrid regimes. With respect to Pakistan, some argue that the country is unlikely to recover in the foreseeable future from setbacks to the democratic process that occurred in the 2000s.⁸² Others assert with bewildering certainty that Pakistan's 'illiberal democracy' is an 'end-state'.⁸³ Still others pontificate over Pakistan's 'sham constitution' in the conviction that 'naming and shaming' can be 'an effective strategy for achieving positive change in and of itself'.⁸⁴ With few exceptions, there is little recognition of the contribution of the 1973 Constitution as an instrument of constitutional struggle towards a democratic order.

However, while there is scepticism about the democratic development of grey zones, there is growing scholarly appreciation of the empirical diversity in methods of constitution-making across political contexts. Conscious cross-fertilisation of these two fields of knowledge would help immensely in terms of understanding constitution-making in grey zones. Some recent works on constitutional change in transitional contexts point in this direction. They refer to the 'achievement of constitutionalism',⁸⁵ 'transitional constitutionalism'⁸⁶ or 'constitutional tipping points'.⁸⁷ Implicit in these concepts is the idea that far from being idealised norm-descriptors, constitutions are instruments of contestation and change towards a normative constitution in transitional contexts.

What does resurgent constitutionalism look like in Pakistan? Jackson's typology of constitution-making, derived from diverse contexts, provides an instructive counterpoint to the case of Pakistan. It encompasses three models of constitutional origination – 'quick clean break', 'incremental' and 'interim'.⁸⁸ In some ways, the making of the 1973 Constitution resembles Jackson's 'incremental' constitution, in which a constitution is reconstructed over a long period of time in a post-conflict setting through open-ended and reflexive processes of informal negotiations, legislative actions and judicial interpretation – as in the cases of Poland and Hungary.⁸⁹ At the same time, it resembles Jackson's 'interim' constitution, in which a constitution is created through a staggered process with various predetermined mechanisms for different constitution-making activities – South Africa being a

⁸² Larry Jay Diamond, 'Is Pakistan the (Reverse) Wave of the Future?' (2000) 11(3) *Journal of Democracy* 91.

⁸³ Chaitram Singh and Michael Bailey, 'Praetorian Democracy, Illiberal But Enduring: Pakistan as Exemplar' (2013) 35 *South East Review of Asian Studies* 103.

⁸⁴ David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863, 870.

⁸⁵ Albert HY Chen, 'The Achievement of Constitutionalism in Asia: Moving beyond "Constitutions without Constitutionalism"' in Chen (n 38) 1–16.

⁸⁶ Jackson (n 31) 1252–59; Jiunn-Rong Yeh and Wen-Chen Chang, 'The Changing Landscape of Modern Constitutionalism: Transitional Perspective' (2009) 4(1) *National Taiwan University Law Review* 145–48; Arthur J Jacobson, 'Transitional Constitutions' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press, 1994).

⁸⁷ Victor V Ramraj, 'Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice' (2010) 1(2) *Transnational Law Theory* 191.

⁸⁸ Jackson (n 31) 1260.

⁸⁹ *ibid* 1265–66.

paradigmatic example of this kind of constitution-making process.⁹⁰ But neither model fully captures the cyclical nullification and revival of the 1973 Constitution. Unlike Jackson's 'incremental' constitution, the 1973 Constitution was not intended to be provisional. And unlike Jackson's 'interim' constitution, the 1973 Constitution was suspended by a dictator only a few years after promulgation.

Pakistan's resurgent constitutionalism has followed a different path. It is incremental in that it is rooted in a 'permanent constitution' that has been buffeted through successive cycles of suspension–amendment–revival by de facto regimes, surviving at times only in a formal sense, to be salvaged and reclaimed again through a return of electoral democracy. Thus, the same constitutional document has been heavily contested and negotiated along the way. It has experienced multiple iterations of extra-constitutional change, but also compounding periods of democratic reconstruction. This incremental process has allowed for extended public discussion on the Constitution and its meaning over a significant period of time. It has provided a common platform for invoking challenges to and mobilising resistance against competing norms that are antithetical to democratic constitutionalism – including military authoritarianism and constitutional theocracy – and in the process consolidating incremental victories for democracy. Authoritarian forces have also instrumentalised the Constitution, but have refrained from abrogating it for fear of provoking a political backlash.⁹¹ Thus, the Constitution is the cornerstone of Pakistan's political discourse as well as the central site of struggle for constitutionalism, notwithstanding the 'complex and multidimensional currents of constitutional thought and practice in the country'.⁹²

Deriving insights from Pakistan's historical experience, I make three theoretic arguments regarding founding moments in grey zones. Foremost, I argue that in order for a founding moment to be consequential to constitutional development, it need not have revolutionary origins or break completely with the old legal order. In a post-colonial milieu where the military is a dominant institution and has all too often invoked doctrines like 'revolutionary legality' and 'necessity' to misappropriate power,⁹³ insisting on a sweeping and radical break with the past would force proponents of constitutionalism to choose between the extremes of impossibility and self-annihilation.⁹⁴ Further, I argue that a founding moment can be reduced neither to the particularities of the originating processes of a new constitution nor the substantive design of a constitution. A founding moment – and indeed constitution-making in general – is endogenous to and contingent upon political conditions. What imbues a constitutional moment with the normativity

⁹⁰ *ibid* 1267–70.

⁹¹ Mohammad Waseem, 'Constitutionalism and Extra-constitutionalism in Pakistan' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press, 2015) 133.

⁹² *ibid* 128.

⁹³ TKK Iyer, 'Constitutional Law in Pakistan: Kelsen in the Courts' (1973) 21(4) *American Journal of Comparative Law* 759.

⁹⁴ Arato (n 27) 218–19.

of a 'founding' is its historical grounding in a broad democratic movement as well as its resurgence or the degree to which it acquires social and political ownership for the transition to constitutionalism over time. Finally, I argue that recognising a founding moment in grey zones is an exercise in retrospective reflection. Whether the moment transpires in a short period of time or through a 'quick clean break', or whether it extends across a substantial period or happens incrementally over successive periods of regression and revival, the process of determining whether it matters as a concrete reality is inherently intertemporal.⁹⁵

The following section deconstructs the abstract notion of a founding moment in the historical context of the 1973 Constitution, and contemplates how the making of the Constitution has mattered for constitutional change in Pakistan – specifically, how it has provided a tangible rallying point for upholding a democratic-constitutional order against 'constitution-wreckers'.⁹⁶

III. 'Permanent Constitution' as a Founding: *Ex Ante* and *Ex Post*

The resurgent model of founding moments has *ex ante* and *ex post* elements: *ex ante* in the sense of historical conditions that enable an unprecedented democratic consensus; and *ex post* in the sense of post-enactment exogenous struggles to entrench constitutional norms.

The *ex ante* conditions in which the 1973 Constitution is grounded relate to a series of events beginning in the late 1960s and culminating in the actual drafting of the Constitution between 1971 and 1973. The late 1960s was a period of major socio-economic flux. The military experienced its first political backlash in the Indo-Pakistan conflict of 1965.⁹⁷ By 1968, the deteriorating economic situation resulting from this conflict, combined with rising discontentment over regional disparities and political oppression, put in motion a wave of popular unrest across Pakistan against Ayub Khan's military regime.⁹⁸ A number of different social and political movements, including students, workers, and new and revived political parties, catalysed widespread agitation against the regime.⁹⁹ This 'anti-Ayub movement' compelled a transfer of power to another military strongman, General Yahya Khan, who immediately imposed martial law and abrogated the 1962 Constitution.¹⁰⁰ Growing political pressure on the military eventually led

⁹⁵ Jackson (n 31) 1278.

⁹⁶ Elster (n 32) 356.

⁹⁷ Rounaq Jahan, 'Ten Years of Ayub Khan and the Problem of National Integration' (1970) 2(3) *Sage* 277.

⁹⁸ Burki (n 12).

⁹⁹ Talukder Maniruzzaman, "Crises in Political Development" and the Collapse of the Ayub Regime in Pakistan' (1971) 5(2) *Journal of Developing Areas* 221.

¹⁰⁰ Lawrence Ziring, 'Militarism in Pakistan: The Yahya Khan Interregnum' (1974) 6(1) *Asian Affairs: An American Review* 402.

to the first general election in 1970 based on universal adult franchise. The 1970 election is widely accepted as the most free and fair in Pakistan's history¹⁰¹ and marked the first formal victory for pro-democracy forces. The electoral winners within each wing won significant majorities: the Awami League in the East and the Pakistan People's Party (PPP) in the West.¹⁰² However, at the same time, this East–West divide was exploited by the military to its political advantage,¹⁰³ resulting in a military operation in East Pakistan, the secession of the latter with military and diplomatic aid from India, and finally the retreat of the Pakistan military in 1971.¹⁰⁴ Paradoxically, this phase of deep crisis opened up a critical window of opportunity for constitution-making. Where the country had struggled to create a permanent constitution for almost a quarter of a century because of the East–West imbalance and the political dominance of the military, the removal of these impediments in the aftermath of East Pakistan's secession enabled a constitution to be made within a short span of fifteen months. Regardless of the many flaws in the process, the outcome was an unprecedented constitutional settlement.¹⁰⁵

In complete contrast to past constitutions, this consensus imparted a high degree of democratic legitimacy to the 1973 Constitution. Yet, the populist *ex ante* context and the consensus producing the Constitution were not sufficient conditions for ensuring the long-term survival of the Constitution. The evolution of social and political support for the Constitution over time is a major determinant in explaining the resurgence of the Constitution.

Ironically, the Constitution suffered its worst setbacks during the early phase of its life, starting with the rapid centralisation of power by the majoritarian PPP government and leading to General Zia's military coup in 1977.¹⁰⁶ In 1979, billions of dollars of military aid poured into Pakistan from the US and Saudi Arabia, setting the country on a path of religious radicalisation to resist the Soviet invasion in Afghanistan.¹⁰⁷ From 1977 to 1984, the Constitution remained suspended and the Constitutional Courts were barred from exercising judicial review powers.¹⁰⁸ The Constitution was revived after extra-constitutional amendments in 1984 to reconsolidate the military's political control prior to elections.¹⁰⁹ However, what is often missed in this oft-regurgitated narrative on Zia's defacement of the 1973 Constitution is the fact that the revival of the Constitution was not merely an act of political gratuitousness or, alternatively, regime legitimisation.

¹⁰¹ GW Choudhury, 'The Last Days of United Pakistan: A Personal Account' (April 1973) 49(2) *International Affairs* 229.

¹⁰² Khan (n 62) 105–06.

¹⁰³ Muhammad Rizwan, 'Aftermath of the Elections 1970: From Disparity to Dissection' (2014) 3(4) *Asian Journal of Management Sciences and Education* 127.

¹⁰⁴ Sisson and Rose (n 14).

¹⁰⁵ Khan (n 62) 108–13.

¹⁰⁶ Jalal (n 49) 90–91.

¹⁰⁷ Omar Noman, 'Pakistan and General Zia: Era and Legacy' (1989) 11(1) *Third World Quarterly* 28.

¹⁰⁸ Noman, *The Political Economy of Pakistan* (n 73) 140–50.

¹⁰⁹ Hasan-Askari Rizvi, 'The Civilianization of Military Rule in Pakistan' (1986) 26(10) *Asian Survey* 1067.

On the contrary, the dictator was compelled to change tack because of unrelenting opposition against his regime. One powerful locus of this opposition was the massive, populist left-wing political alliance of major political parties known as the 'Movement for the Restoration of Democracy' (MRD).¹¹⁰ The central demand of the MRD was the restoration of the 1973 Constitution,¹¹¹ and it was instrumental in mounting pressure on Zia to resuscitate the constitutional process and hold elections, and to thereby force open institutional avenues for political contestation.

Zia's death in a mysterious plane crash in 1988 paved the way for another transition to civilian rule. Tenuous as this transition was, it nonetheless brought about two major transformations that catapulted the Constitution to the centre-stage of politics. One was the political rise of the judiciary and the other was a deepening of political party identification with the Constitution. The judiciary's power derived from two main sources in the Constitution: the Fundamental Rights¹¹² and, ironically, the presidential power to dissolve governments under Article 58(2)(b). The revival of the electoral process created the space for the courts to re-invent and propagate their role as custodians of a new, democratic order through judicial activism.¹¹³ In the process, they evolved jurisprudential tools like PIL to ensure their institutional survival and enlarge their capacity to intervene in political questions. Alongside this, the involvement of the courts in dissolution cases under Article 58(2)(b) empowered them to judge the fate of elected governments.¹¹⁴ The politics of the 1990s was thus crucial in moulding the role of the courts as mediators between the deep state and civilian political parties – an institutional trend that persists up to the present day.¹¹⁵ Political parties also emerged as important political forces in the 1990s.¹¹⁶ They boldly invoked Fundamental Rights in the courts against military encroachment in politics,¹¹⁷ removed Article 58(2)(b) from the Constitution through a unanimous vote in parliament in 1997¹¹⁸ and jockeyed for leverage in the courts through strategic judicial appointments and court-packing.¹¹⁹ That all these contestations were anchored in the 1973 Constitution was a major factor in enhancing the political ownership of the Constitution.

In 1999, General Musharraf overthrew a civilian government in a military coup. Musharraf suspended the 1973 Constitution, purged the courts for regime

¹¹⁰ Tariq Ali, 'Movement for the Restoration of Democracy in Pakistan' (1984) 11(1) *India International Centre Quarterly* 57.

¹¹¹ *ibid* 59.

¹¹² Khan (n 20) 297–300.

¹¹³ *ibid* 304–07.

¹¹⁴ Siddique (n 18).

¹¹⁵ Khan (n 20) 307–09.

¹¹⁶ Haris Gazdar, 'Pakistan's Precious Parties' (2008) 43(6) *Economic and Political Weekly* 8.

¹¹⁷ Khan (n 20) 304–07.

¹¹⁸ Anwar H Syed, 'Pakistan in 1997: Nawaz Sharif's Second Chance to Govern' (1998) 38(2) *Asian Survey* 116.

¹¹⁹ Lorne Neudorf, *The Dynamics of Judicial Independence: A Comparative Study of Courts in Malaysia and Pakistan* (Springer, 2017) 172–74.

legitimation, marginalised political parties, sponsored new parties and alliances, re-inserted Article 58(2)(b) through a fresh set of unilateral constitutional amendments in 2002 and engineered elections on the basis of the revived but heavily amended Constitution.¹²⁰ However, unlike in the 1980s, Musharraf had to contend with a burgeoning media, an activist judiciary, and international pressures for rule of law reform and democratisation.¹²¹ The fragile state of the regime became apparent in 2007 when the Supreme Court's constitutional challenges to Musharraf – grounded in the Fundamental Rights jurisprudence¹²² – provoked the dictator to move the process for the Chief Justice's removal. This event ignited a large-scale street mobilisation that was spearheaded by lawyers, but was, importantly, supported by a host of other actors, including political parties, the media and civil society organisations, that cohered around the rhetoric of restoration of the Constitution and the rule of law to depose Musharraf. This 'Lawyers' Movement', as it came to be known, culminated in fresh elections, a new democratic government, the re-instatement of the judges and a humiliating exit of the military from politics.¹²³

The transition stimulated by the Lawyers' Movement led to a period of constitutional rehabilitation. The most prominent feature of this period was the restoration of the 1973 Constitution to its original form by the landmark Eighteenth Constitutional Amendment.¹²⁴ The Eighteenth Amendment was introduced by the first post-Musharraf civilian government and received unanimous parliamentary approval in 2010.¹²⁵ It modified or substantially rewrote over one-third of the Constitution with the overarching objective of reversing illegal constitutional amendments since the Zia era, and is arguably the most crucial political consensus in Pakistan since the making of the 1973 Constitution. The provision-enhancing changes in the Amendment include the removal of Article 58(2)(b), the restoration of a semi-parliamentary system with more powers to the Senate, the establishment of an independent and permanent Election Commission for conducting elections, the strengthening of judicial tenure and mechanisms for judicial appointments, and the expansion of judicial review powers through the new Fundamental Rights.¹²⁶ Further, the Amendment has made significant strides towards a decentralised federation, devolving some highly important issues to

¹²⁰TA Qureshi, 'State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan' (2009–10) 35 *North Carolina Journal of International Law and Comparative Regulation* 485.

¹²¹Zahid Shahab Ahmed and Maria J Stepan, 'Fighting for the Rule of Law: Civil Resistance and the Lawyers' Movement in Pakistan' (2010) 17(3) *Democratization* 492.

¹²²Khan (n 20) 323–27.

¹²³Ahmed and Stepan (n 121).

¹²⁴Katharine Adeney, 'A Step towards Inclusive Federalism in Pakistan? The Politics of the 18th Amendment' (2012) 42(4) *Publius* 539.

¹²⁵'Pakistan's National Assembly Passes Key Constitutional Reforms' *Sunday Telegraph* (8 April 2010), www.telegraph.co.uk/news/worldnews/asia/pakistan/7567994/Pakistans-national-assembly-passes-key-constitutional-reforms.html.

¹²⁶Adeney (n 124).

provincial governments¹²⁷ and, to a more limited extent, to local governments as envisaged by the original Constitution.¹²⁸

Developments in the aftermath of the Eighteenth Amendment have edified the normative relevance of the Constitution. These include the completion of an elected government's tenure for the first time in Pakistan's history followed by a peaceful electoral transition in 2013; peaceful transfer of power by two army chiefs since General Musharraf; the completion of tenure of five Chief Justices of the Supreme Court since the retirement of Chief Justice Iftikhar Chaudhry in 2013; the re-distribution of a larger proportion of national revenues to the provinces and the re-allocation of interprovincial shares in favour of historically marginalised regions; and the devolution of power to the provinces and the operationalisation of local governments through elections. Although the Eighteenth Amendment is by no means an uncontested and irreversible reality – especially given the abiding civil–military imbalance – these are nonetheless far-reaching political shifts, accompanied by major institutional overhauling, and signify a deepening of constitutional accommodation.

The following section summarises the main theoretical insights on founding moments based on Pakistan's experience with constitutional evolution.

IV. Rethinking Founding Moments: What Pakistan's Experience Demonstrates

The making of the 1973 Constitution is a case of resurgent constitutionalism. This process of periodic resurgence shares many attributes with diverse examples of constitution-making in grey zones around the world. It neither fully breaks with the past, nor is it immediately entrenched through an open process of public participation. It is characterised by protracted and tenuous non-linear progress, at times degenerating into a reverse wave before accumulating any positive gains for constitutionalism. The paradox that resurgent constitutionalism raises for founding moments in grey zones is not merely that the enabling conditions of constitution-making are also those constraining constitution-making;¹²⁹ the real paradox is that contexts that are new to a democratic constitution are also those that invariably need an incubatory period for evolving constitutional norms. Thus, I have argued that 'founding moments' are key periods of democratic constitution-making from which the conditions of constitutionalism emerge temporally in grey zones, largely irrespective of judgements about the original constitution being 'good' or 'sham'. I have further argued, as a necessary corollary to this, that

¹²⁷ *ibid* 9–11.

¹²⁸ 'Devolution Talk: Local Government Polls, is Devolution Anathema to Political Parties?' *Herald Forum* (15 May 2015), herald.dawn.com/news/1153045.

¹²⁹ Jackson (n 31) 1249.

a founding moment in a transitional context has two elements: *ex ante* historical and political conditions of constitution-making – that give the constitution its initial democratic legitimacy – and *ex post* resurgence and revalidation of the constitution over time.

One of the big contributions of the present case study on Pakistan's founding moment to theories of constitutional origination is the centrality of the *ex post* element of constitution-making. The almost exclusive focus on the *ex ante* element, as well as the particularities of the immediate process of constitution-making in extant theories of founding moments, is not only of limited value to but also deeply ignorant of the political and structural conditions obtaining in contemporary grey zones. The theoretical privileging in constitutional foundations of the *ex ante* notions of a clean break with the past and the immediate entrenchment of constitutions does not coincide with the historical reality of constitution-making in new and transitional democracies. A constitution that is expected to not only define the rules and norms of the political game but also to provide the moorings of democratic transition necessitates an *ex post* struggle for constitutional entrenchment. The *ex post* pushback against anti-constitutional and anti-democratic forces is the concrete test of a constitution's superlative value as a founding. Thus, I have emphasised the importance – indeed, the necessity – of the *ex post* element to a founding. It is only the *ex post* progress – of what is always a nominal constitution at birth to a normative one over time – that legitimates any constitution through an iterative process of negation, resurgence, contestation, engagement and ownership. Unlike the traditional notion of a collective expression of community during a limited moment of higher law-making, the political model of resurgent constitutionalism facilitates multiple opportunities for collective validation of a founding constitution. It is the *ex post*, then, that gives real meaning to a founding, which, devoid of any real test of survival, only remains an intellectual abstraction.

None of this ought to detract from the continuing fallouts and challenges of resurgent constitutionalism in Pakistan or other transitional democracies. Inherent within resurgent constitutionalism is the deep tension between structural continuity and change, and hence the risk of constitutional reversal. In Pakistan, the staying power of the military as well as supporters of an Islamist constitutional dispensation – the two often buttressing each other – is an obvious challenge. Because of ongoing security problems in the region, the unstable diplomacy between Pakistan and India over the long-standing Kashmir issue, the militarisation of Pakistan's marginalised province of Balochistan, the uncertainties plaguing the border between Pakistan and Afghanistan, the military and drone operations in Pakistan's troubled Tribal Areas in the northwest, and the military's unchanging policy of protecting certain militant and terrorist groups for strategic purposes,¹³⁰ the military avows both sufficient cause and institutional power to retain its political ascendance, though perhaps no longer in the guise of military dictatorships

¹³⁰ Hasan-Askari Rizvi, 'New Dimensions of Security' *Express Tribune* (20 October 2014), tribune.com.pk/story/777943/new-dimensions-of-security.

and martial laws. The most recent general elections of 2018 are widely believed to have been rigged and engineered by the military on a large scale in favour of its preferred candidate.¹³¹ Thus, a complex civil–military power-sharing arrangement continues to persist, demonstrating that a ‘clean break’ from authoritarianism is a very long-term political project in transitional countries – one that no constitution can enforce without an equally long-term *ex post* political commitment and institutional evolution.

Despite Pakistan’s many current and foreseeable constitutional challenges, resurgent constitutionalism has both empowered and broadened constituencies of constitutionalism over time. Just as the military appears to have firmly reasserted control over the political process, another social movement is surging in the northwestern province of Khyber Pakhtunkhwa and the adjoining Tribal Areas that have been sites of military operations related to the War on Terror for many years. Describing itself as the ‘*Pashtun Tahafuz* Movement’ (translated as ‘*Pashtun* Protection Movement’ or PTM), the Movement calls, among other things, for an end to enforced disappearances, extra-judicial killings and other rights abuses allegedly committed at the hands of Pakistan’s military and intelligence services.¹³² That the core express demand of the PTM is that people of the region (mostly ethnic Pashtuns) be granted equal protection of the Fundamental Rights and that this demand has found resonance in non-*Pashtun* communities across the country is a powerful testament to the socialisation of the 1973 Constitution.

¹³¹ ‘Viewpoint: Pakistan’s Dirtiest Election in Years’ *BBC News* (23 July 2018), www.bbc.com/news/world-asia-44923565.

¹³² M Ilyas Khan, ‘Manzoor Pashteen: The Young Tribesman Rattling Pakistan’s Army’ *BBC News* (23 April 2018), www.bbc.com/news/world-asia-43827660.