
Book Reviews

Jennifer Balint, Editor

Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring. By Nimer Sultany. Oxford: Oxford University Press, 2017.

Reviewed by Mohammad Fadel, University of Toronto Faculty of Law

It is hard to be too effusive in one's praise for this book. It is groundbreaking for several reasons: first, it removes constitutional politics in the Arab world from some exotic margin of constitutional studies and places it in the center of cutting-edge debates about the relationship of revolution to rule of law, the rule of law and legitimacy, and constituent power and constituted power, showing how the Arab experience both enriches constitutional theory and is enriched by it; second, its theoretical sophistication is unmatched by any other work in the field of Arab constitutional politics; and, third, it takes seriously the contributions of Arab constitutional lawyers themselves by incorporating their arguments and analysis into the structure of the book instead of treating them simply as derivative authors with nothing relevant to contribute to constitutional theory. This book's contribution is not limited to its theoretical ambition, however. Sultany also skillfully incorporates several case studies drawn from numerous Arab jurisdictions, which give his book a broad empirical scope. This, too, is a marked contrast from much of previous scholarship of the Arab Spring that focused largely on only one or two Arab states.

The book is divided into three parts. Part I sets up the theoretical problem of legitimacy, rule of law and revolution, and the tensions inherent in casting legitimacy in terms of either rule of law or of revolution. Sultany reviews existing scholarship on the history of constitutional politics in the Arab world in the nineteenth and twentieth centuries, expressing doubts about what he calls the "formalist" approach of classifying Arab constitutions into various ideal types, such as "ideological," "instrumental," or "authoritarian." He argues further that whatever legitimacy defects exist in postindependence Arab regimes cannot be

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attributed to particular defects in their formal constitutions; rather, the legitimacy deficit is itself a function of the limits of constitutional legitimation writ large. He then discusses the tension between ideas of constitutional legitimation and revolutionary legitimation and the limitations of each as a source of legitimation.

Part II discusses in more detail the tension between ordinary law and revolutionary law and how each, simultaneously, contributes to and undermines the legitimation project that is the goal of constitutional politics. In this respect, the legitimacy obtained through ordinary law is reflected in the continuity of the principles of the legal order, even after a period of revolutionary upheaval. Revolutionary law, on the other hand, takes its legitimacy precisely from the revolutionary moment to justify *departure* from ordinarily applicable norms of legality to better achieve the goals of the revolution. Sultany explores the themes of continuity and rupture through a series of cases covering a broad spectrum of politically sensitive cases in Egypt and Tunisia, such as property rights, political rights of old regime members, and how, if at all, to hold old regime members accountable for their prior crimes.

Part III looks at the question of continuity versus rupture from the perspective of constitutional law, and whether “revolutionary” constitutions (constitutions representing “rupture”) can be meaningfully distinguished from “reformist” constitutions (constitutions representing continuity). Sultany’s analysis shows that both types of constitutional projects suffer from similar problems of legitimation deficits, often for the same reasons, such as concerns about participation and adequate inclusion of the “people.” He concludes Part III with an interesting discussion of the dichotomy between “constituent power” and “constituted power” and how the constitutional experiments of the Arab Spring contribute to a better understanding of the relationship between these two concepts.

The book is well written, engaging, and erudite, drawing on the theories of well-known western constitutional theorists as well as Arab constitutional law scholars. It is also extremely accessible, allowing even nonspecialists in the constitutional politics of the Arab world to benefit greatly from the book. By showing the limitations of formalist rule of law theories of constitutional legitimation and those of sociologically oriented theories of constitutional legitimation, Sultany invites his readers to eschew a reductionist approach to constitutional law that assumes direct relationships between certain forms or modes of constitutions and successful legitimation. Without adopting an explicitly anti-theoretical position, his work calls upon constitutional theorists to adopt a more critical approach to the relationship of constitutional theory to constitutional legitimation.

A weakness of the book, however, is that to cover such a broad field, Sultany could only treat a limited range of issues connected to the constitutional politics of each country. The author's illustrative approach to constitutional politics in the post-Arab Spring Arab world meant that even among the examples provided, he could not explore all of them with equal depth or rigor. Rather, the author brings together these different experiences to illustrate the more universal problem that concerns him: the tendency of constitutionalism to overpromise and underdeliver.

While such an approach is understandable, it leaves a reader with greater familiarity with particular cases hungry for more. For example, in the author's discussion of the logjam in the Egyptian constituent assembly (CA), the author did not attempt to go beyond formalistic objections raised by some Egyptians to the "representativeness" of the CA, without considering the positionality of the dissenters. This contrasted with his careful emphasis of this point when discussing the lustration law in Egypt. In the latter case, the reader is left with the impression, rightly, that liberal formalism undermined the prospects of democratic transition. The failure to incorporate similar concerns with respect to the make-up of Egypt's CA, however, leaves the reader in limbo in reaching a normative conclusion regarding the position of the dissenters: were they justified in boycotting the deliberations of the constituent assembly or were they seeking to extort concessions by implicitly threatening to invite the military's intervention? The same criticism could be directed to his discussion of the Egyptian Supreme Constitutional Court (SCC): the SCC not only was a juridical creature of the old regime, its individual justices were highly privileged members of the old regime. The inconsistent or incomplete concern with the positionality of the actors in constitutional politics produces a certain kind of normative ambivalence in the book's narrative, even in contexts where I would argue that none is warranted.

While I am sympathetic to Sultany's desire to push back against bad uses of constitutional theory to understand constitutional history and in complete agreement regarding the necessity to resist any kinds of liberal triumphalist narratives of constitutional theory, I do not agree that constitutional theory fails to provide us correct answers, at least in some cases. With both hindsight and foresight, for example, it was predictable that allowing Egypt's SCC to oversee the process of drafting a new constitution and the legality of parliamentary elections during the transition period would produce a disaster.

His overall argument, however, is persuasive: revolution and counterrevolution, ordinary legality and revolutionary legality, and constituent power and constituted power are ideas that do

not operate as “either or” binaries but are rather in continuous dialectic in all regimes. To the extent constitutional theory attempts to deny this, or to ignore the dialectical forces that are in play in constitutional politics, constitutional theory obfuscates rather than illuminates constitutional practice. In the Age of Trump and with the spread of radical nationalist parties in Europe, no one should have any ethnocentric illusions of liberal triumphalism. It is high time, therefore, that the systematic study of constitutional politics in the Arab world be viewed as raising questions central to constitutional theory and not just a curiosity limited to a few specialists. This book makes a powerful case for why that is so.

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Shari'ah On Trial: Northern Nigeria's Islamic Revolution. By Sarah Eltantawi, Oakland: University of California Press, 2017.

Reviewed by Mark Fathi Massoud, Department of Politics and Legal Studies Program, University of California, Santa Cruz

More than a decade before the Arab Spring, another revolution was taking shape: an Islamic legal revolution in West Africa. It began in 1999 with the introduction of shari'ah (roughly translated as Islamic law) by the governor of Nigeria's northwestern state of Zamfara.¹ By 2002, all 12 of northern Nigeria's Muslim-majority states implemented Islamic-based penal codes. A loosely organized movement also began to coalesce around the internationally reported criminal trial of Amina Lawal, a woman facing a stoning punishment for alleged sexual misconduct. An Islamic appeals court eventually acquitted Lawal, and the Islamic revolution ultimately failed. These events would later give rise to Boko Haram, an extremist paramilitary “of poor, uneducated boys” (32), and to a milieu in which “no social reward” exists for critical thinking (200). An ethnographically and historically informed account of this remarkable social and legal history is found in Sarah Eltantawi's *Shari'ah on Trial*.

¹ Authors writing in English transliterate the Arabic word, shari'ah, differently—commonly shari'a, shari'ah, shariah, or sharia—with apostrophes or diacritical marks to represent the Arabic 'ayn. To remain consistent with Eltantawi's book, this article uses shari'ah.