

Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring. Nimer Sultany, (Oxford, UK: Oxford University Press, 2018). Pp. 320. \$80.00 cloth. ISBN: 9780198768890

Reviewed by Abdel Razzaq Takriti, Department of History, University of Houston, Houston, TX; e-mail: artakriti@uh.edu

Nimer Sultany's *Law and Revolution* offers a long overdue corrective to a canon of legal theory that gives African and Asian experiences short shrift. It likewise poses a serious challenge to strands of area studies that, for all their claims of superseding orientalism, continue to approach entire regions in the Global South as mere sources of empirical data rather than dynamic sites possessing generative theoretical capacity. But there is much more to this exceedingly important book than introducing legal theorists to the Middle East or bringing legal theory to Middle East studies. Perhaps it could be best characterized as a work of epistemological reversal, utilizing a deep reading of the Arab Spring to critique conceptual orthodoxies.

The research on offer is exceptional in its scope and ambition. Sultany draws on vast swaths of primary material. He presents penetrating analyses of a dazzling array of Arab legislative documents all the while engaging with the oeuvres of major Arab and Euro-American theorists, from John Rawls to Tariq al-Bishri, and from Alasdair MacIntyre to Abdel Razzaq al-Sanhuri. These varied sources are used to illuminating effect in the book's three parts, each of which is centered on revolution's intersection with a major concept: legitimacy, legality, and constitutionalism. In discussing legitimacy, Sultany provides a tour of the cul-de-sacs that are arrived at by theorists trying to resolve contradictions that lie at the heart of the concept. He does not seek a final resolution to the tension between sociological and normative criteria for legitimization, nor is he eager to find a eudaemonic equilibrium between popular sovereignty and rights. The very virtue of his work lies in its refusal to exempt any of the prevailing approaches from *immanent* critique, an unrelenting yet revealing exercise that judges abstract suppositions by their own internal standards. In his embrace of negation as a method, and through his location of theory within historical reality rather than in a set of reified resolutions, Sultany squarely fits within the radical wing of the Hegelian tradition. Indeed, his work is the most comprehensive dialectical exercise that I have recently encountered in relation to the contemporary Arab world.

Sultany starts by launching an inquiry into the historical origins of the "legitimacy deficit." Although he extensively cites prior scholarship on the subject and echoes many of its empirical findings, he also critiques established area studies frameworks, notably Nathan Brown's notion that the Arab world is dominated by "constitutions without constitutionalism" (*Constitutions in a Nonconstitutional World*. [Albany: SUNY Press, 2002]). Sultany reasonably notes that the bifurcation of constitutions into "constitutionalist" and "non-constitutionalist" types is theoretically problematic, premised as it is on establishing "an idealized version of a linear, progressively-evolving, stable, and effective liberal constitutionalism" as the yardstick against which Arab constitutions are measured (p. 39). This aggrandizement of western liberalism tends to be accompanied by the diminution of the Arab constitutional trajectory and its subjugation to sociological reductionism. Against the conventional wisdom, Sultany views Arab constitutions as being more than mere instruments of legitimation serving the regimes in power, and his narrative is attentive to the values and aspirations that underlay them and the rich history of social struggle that determined many of their features (p. 67).

Sultany detects equally serious problems with the theoretical literature on revolution and legality, centered as it is on the rupture/continuity binary, overemphasizing the importance of rupture at the expense of continuity or vice-versa. Formalist scholars like Frederic Maitland excessively highlight rupture, insisting on the need to separate the law from moral judgment. For them, procedural continuity is the marker of what is lawful or not, and by this measure, a revolution could be judged as unlawful due to the procedural flaws that underlay it, separating it from the preceding legal order (p. 135). Conservative philosophers like Edmund Burke take a different approach, highlighting normative continuity by asserting the lawfulness of revolutions that restore an ancient order and the unlawfulness of revolutions that comprehensively break with the age-old wisdom of *ancien regimes* (p. 136). Alternatively, a preference for

rupture is exhibited by positivists like Hans Kelsen who view the law as a system of rules reflecting the prevailing balance of power. In their reading, the legitimacy of legal change is justified on the basis of the “efficacy and stability” of the new order (p. 137). This contrasts with constructivists like Ronald Dworkin, whose stress on the importance of continuity derives from a “conception of the law as a gapless and coherent system” (p. 142).

Sultany convincingly argues that the Tunisian and Egyptian revolutions demonstrate the deficiency of these diverse approaches. Through a detailed account of the legal changes and ruptures taking place in these historic processes, he shows that the very nature of revolution is defined by a dialectic in which elements of legal change and rupture simultaneously exist. These reflect the contradictory concerns and interests of various political and social forces and the competition between revolution and counter-revolution that is unleashed by the prospect of radical change. Thus, formalists and conservatives both fail to adequately account for such phenomena as the Arab Spring as a result of privileging either the formal or the normative legitimacy of the previous legal order. As for positivists and constructivists they overplay the systematic nature of the law or exaggerate its coherence.

Sultany’s detailed examination of legality in the context of the Arab Spring illustrates the possibility of an alternative approach that combines normative and sociological factors, that accounts for the interplay between continuity and rupture, and that invites us to think of the law as a contradictory site of social and political struggle that is expressed through an inconsistent “plurality of voices” as opposed to a singular voice (p. 158). The dynamic between these different voices is captured by closely examining the response of Egyptian and Tunisian judiciaries to the revolutionary processes that surrounded them. To that end, dozens of decisions are examined in this book, arising out of different court levels: first instance criminal courts, cassation courts, administrative courts, and constitutional courts. Based on these cases, Sultany arrives at a number of significant conclusions.

Firstly, the binary between “judicial independence” and “judicial reform” is as misleading as the dichotomy between continuity and rupture. The Egyptian and Tunisian cases reveal that revolutions do not only unleash “external” struggles between the political and judicial branches, but also “internal” struggles within these branches. These correspond to alliances forged across different branches of government as well as various social constituencies (p. 161). To give one example out of many furnished by Sultany, some of the staunchest advocates of the concept of judicial independence in the pre-revolutionary era—such as the Egyptian Muslim Brotherhood under Mubarak—became proponents of judicial reform after their post-revolutionary election to executive office (p. 163). Secondly, Sultany argues that different legitimization devices were inconsistently utilized in the context of legal struggles, including electoral, revolutionary, and procedural legitimacy. Thirdly, the designations revolutionary and counterrevolutionary were highly unstable and are thus not always helpful for understanding the tensions at play. For instance, in their struggle with lawyers over proposed legal profession reforms in 2011, many Tunisian judges often took a seemingly “counterrevolutionary” stance. This contrasted with what could be read as a more “revolutionary” position adopted by them in relation to interventions in the judicial branch led by the interim government in September 2012 (p. 170).

In reading courts decisions produced by these judges and their Egyptian counterparts, Sultany is also sensitive to the competing visions of political community that underscored them. He illustrates, for instance, that the Egyptian Supreme Court tended to promote a liberal market-based vision of the community, whereas the administrative courts appealed to a republican view. The former conceived of popular sovereignty as an aggregate of individual wills and interests, whereas the latter emphasized its civic dimension rooted in mass mobilization (p. 202). Ultimately, in Egypt as well as in Tunisia, the liberal idea of respecting legality won out, undermining popular participatory mechanisms (p. 233).

The assault on popular sovereignty was perhaps best exemplified in the constitutional odyssey unleashed by the Arab Spring. Sultany detects three models of popular participation in the process of constitution-making. In Egypt, an under-inclusive reality emerged. The 2012 constitution enacted by a small committee appointed by parliament under the Muslim Brotherhood was rushed, and so was the 2014 constitution drafted by a military-appointed committee after the coup. Both were marked by lack of mass popular participation. In contrast, the Tunisian constitution making process was far more inclusive, extending over the course of two years of extensive deliberation. This process is defined by Sultany as over-inclusive. In a highly polarized setting like that of post-revolution Tunisia, it reproduced partisan divisions to an almost

debilitating degree (p. 255). As for Libya, it experienced what Sultany calls “vacuous inclusion,” its constitutional process taking shape in a context of severe state weakness (p. 260).

All of these cases of constitution-making in the context of revolution illustrate that the rule of law is not free of the vicissitudes of politics or the weight of history. They also reveal the inadequacy of various approaches to constituent power. These include theories advanced by “populist” philosophers reflecting all colors of the political rainbow (from the Abbe Sieyès to Carl Schmitt and from Ernst-Wolfgang Böckenförde to Antonio Negri), as well as “constitutionalist” theorists ranging from Hannah Arendt to Hans Lindahl. By virtue of his command of the literature, Sultany is able to map the theoretical terrain with precision, showing how populists differ from constitutionalist in so far as the former insist on a limitless constituent power that is inexhaustible and the latter call for “lawful” limits to democratic will and see constitutional enactment as a terminal point (p. 290). The judiciary in Egypt and Tunisia effectively rejected the populist approach, constraining popular will to a great degree, contributing with their rulings to the extinguishment of its flames (p. 321). Their practices, however, did not achieve a synthesis between constituent power and constitutional form of the sort desired by constitutionalists nor did they prevent the instability and violence that the latter dreaded the most. Sultany correctly infers from this that “constitutional legitimations are no more than validations based on abstract principles whose applications and interpretations are controversial and contested” (p. 321).

While Sultany demonstrates the incoherence of revolutionary constitutional processes, he distinguishes between them and the reformist constitutionalism that took place in the context of the Arab Spring in Morocco, Jordan, Bahrain, Oman, and Algeria. As much as revolutionary models were deficient in their application of popular sovereignty as well as participation, reformist exercises comprehensively excluded both. In all of the countries surveyed, the reigning executive power installed reform committees lacking in any serious input from the citizenry, arriving at documents that were normatively vacuous, failing to increase regime accountability or to expand the rights of citizens (p. 287). Notwithstanding the major differences between revolutionary and reformist models, Sultany once again resists the temptation of overlooking their commonalities. When it comes to outcomes, these models, he suggests, differ in degree rather than in kind, the reformist version being simply more radically exclusionary. As for similarities, they can be seen in the shared heightened concern with the stability of the existing or the emerging regime, in the common failure to constrain executive power, and in the persistence of strong continuities with the past (p. 288).

The sober picture painted by Sultany should not mask his evident commitment to emancipatory potentialities. This is clearly manifested in the afterward, in which he laments the “faltering of revolution” that occurred after the initial moments of hope. Far from providing a cautionary tale against revolution, his book calls for a more revolutionary approach to law. As was proven by the events that took place in Algeria and Sudan after the publication of *Law and Revolution*, he was right to conclude that “perhaps the Arab Spring has not ended yet” (p. 324).

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Sylvia I. Bergh, International Institute of Social Studies, Erasmus University Rotterdam, The Hague, The Netherlands; e-mail: bergh@iss.nl

In *Local Politics in Jordan and Morocco*, Janine Clark compares the decentralization reforms in Morocco and Jordan to answer the main question of why some authoritarian regimes engage in decentralizing

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