Book Reviews

Constitutional Revolution, by Gary Jeffrey Jacobsohn and Yaniv Roznai, (New Haven: Yale University Press, 2020), 384pp., hardback, £50, ISBN: 9780300231021.

Constitutional Revolutions is a joint work by Gary Jacobsohn and Yaniv Roznai, two leading comparative constitutional theorists who have combined their respective expertise on constitutional identity and constitutional change, to write a complex and yet enjoyable monograph.

The main contribution of the book is the elaboration and subsequent application of the concept of constitutional revolution to four case studies.

That constitutions change through the political and the judicial process is well known. Whether they do so without immediately visible ruptures or alterations in the constitutional order is another matter. The book then argues that our available conceptual tools are insufficient to account for processes of substantive changes that lead to new constitutions or constitutional paradigms, changes that are not brought about in direct violation of the legal system, that do not take place in one specific moment in time, and which may be even produced through the correct usage of legal mechanisms. Such cases are not systemically studied in the relevant literature. *Constitutional Revolution* fills this gap.

In addition, the authors apply their conceptual innovations to four case studies: Hungary, Germany, India, and Israel. These are

> "notable examples of major constitutional changes in which conventional expectations about what qualifies as 'revolutionary' provide an inadequate basis for accurately describing the transformational significance of what occurred." (p.5)

The concept of constitutional revolution is put to a difficult test, for these case-studies are distinct in their narratives, history, beginnings and ends, as well as in the prospects brought about by the revolutions the authors argue these polities experienced. And yet, and with the caveats and concerns I express below, it is fair to say that it passes the test.

The book has six chapters, excluding the introduction and the conclusion. The introduction provides a conspectus of the book and describes its aims. There we learn that its main goal is to challenge our received views of how radical constitutional change happens. That is, views that limit the concept of constitutional revolution to "the specific occasion of a constitution-producing political events" (p.5)—"'thunder and lightning… [and] fire' (Exodus 19:16)" (p.19). The section also explains a key methodological aspect of the book, namely that the concept of constitutional revolution emphasises the substance of the changes that a given constitution undergoes, rather than the processes by which such changes occur (p.5).

Chapter 2 conceptualises the notion of constitutional revolution and offers the aforementioned reasons for its adoption. A constitutional revolution is thus defined as a "paradigmatic displacement, however achieved, in the conceptual prism

through which constitutionalism is experienced in a given polity" (p.19). That displacement amounts to an "incremental change that portends the promise of major transformation" (p.36), which "leaves the practice of constitutional governance in a very different place from where it had previously been" (p.48). Accordingly, the concept englobes new constitutional arrangements sanctioned by the authority of the previous constitutional order, new constitutional arrangements imposed by external powers, major constitutional departures legislatively enacted, major constitutional departures secured through the use of amendment powers, and major constitutional departures engineered through the interpretive power of a court of law (p.35).

Armed with this conceptual toolkit, Ch.3 kicks off the case studies. It first discusses examples of constitutional transformations triggered by the use of amendment powers: Chile, Taiwan, Japan, South Korea. From there, it focuses on Hungary, which is presented as the archetype "of a constitutional revolution occurring without the invocation of an extraconstitutional constituent power" (pp.8, 61). That is, a country experimenting substantive constitutional changes through prima facie procedurally correct operations of mechanisms of formal amendment.

Chapter 4 focuses on Germany and the relations between the notions of constitutional revolution and constitutional identity. It scrutinises the role of the Federal Constitutional Court and its interpretation of the Constitution's eternity clause in the context of the debate over Germany's role in the process of European integration. The case illustrates that constitutional identity can facilitate as well as hinder "dramatic changes in systemic level configuration" and that the "process by which such change occurs may have revolutionary implications" (p.104).

Chapter 5 studies India and its so-called step-by-step constitutional revolution. The case study is an example of a constitutional revolution driven by jurisprudential efforts embodied in the basic structure doctrine, which the Indian Supreme Court saw as an integral part of India's so-called dynamic constitution. The chapter thus emphasises the role of the Indian judiciary in bringing about substantive changes to constitutional practices, showing how those variations expressed the polity's constitutional purposes, which are in turn constitutive of India's constitutional identity. While the notion of identity has conservative undertones, the court considered that Indian constitutional identity was in itself defined as a long-term revolutionary project.

The role of courts in bringing about constitutional revolutions is again stressed in Ch.6. The section focuses on Israel. One salient aspect of this country's constitutional practice is that it lacks a traditional constitutional moment and a comprehensive constitutional document. Against that background, the chapter argues that such a constitutional moment has been experienced in Israel as a long-term process in which the Supreme Court has presented itself as its main actor. The transition from a system of parliamentary sovereignty to one of constitutional supremacy, is thus directly traceable to the actions of the judiciary (p.12), more prominently to the landmark *Mizrahi Bank* ruling in 1995, where the court affirmed the constitutional status of the Basic Laws and the consequent limited power of the Knesset to modify that body of legislation. In so doing, the court created a constitution by interpretive fiat.

The centrality of the judiciary in these constitutional revolutions confronts the book directly with the problem of constituent power. Chapter 7 thus discusses the idea that "the exercise of constituent power often requires retrospective recognition by constituted organs, most notably by an authoritative court" (p.13). Faced with the problem of accounting for the role of some version of "the people" in processes carried under these circumstances, Jacobsohn and Roznai claim that while citizens may not necessarily be the authors of a new constitution, their role as legitimators remains indispensable: "[To] claim a mantle of legitimacy, the process that culminates in transformative constitutional change should aspire to approximate the people's constituent power" (p.14). Some lessons follow from that role: constituent power is not reducible to sheer power; constituent power exerted by a constituted organ entails a claim for representation of the people; and, this in turn means that the execution of the will of the constituent power requires procedures and organisation (p.259).

The merits of *Constitutional Revolution* are sundry, but I think the main one is that it highlights a particular phenomenon within the broader category of constitutional change that has been neglected in the scholarly literature. Jacobsohn and Roznai do this by elaborating and championing a tool that will allow researchers to grapple with hitherto understudied instances of constitutional change. One can anticipate that the concept of constitutional revolution is likely to be used in the future to analyse more cases like the ones discussed in the book. And rightfully so.

However, while meritorious, as Jacobsohn and Roznai somewhat anticipate (p.30), the capaciousness of the concept of constitutional revolution plants the seeds of its own limitations. And those limitations are more visible in cases of major departures engineered through the interpretive power of a court of law. In what follows I elaborate on three dimensions of this issue.

First, consider the claim that the practices of Israel's Supreme Court generated a constitutional revolution that led to the creation of a constitution through interpretation. As the authors affirm, the tension between the ideals of the Jewish and democratic nature of the state of Israel "loomed large in explaining the Knesset's first failure to adopt a formal constitution" (p.222) and it was central to Justice Barak's opinion in the *Mizrahi Bank* case for dissolving a "disharmonic dilemma of Israeli constitutional politics through a paradigm displacement in the way constitutionalism is experienced in Israel" (p.222). And so, through that dissolution, we learn that the court fashioned a constitutional revolution (p.222).

But, is "constitutional revolution" the concept that best captures processes of constitutional interpretation when the language of the interpreted provisions, due to their indeterminacy, includes meanings that can in turn provoke the outcomes which are described by Jacobsohn and Roznai as revolutionary?[1] It seems that what the authors are telling us is that radical substantive changes in the meaning of a constitution suffice to trigger the usage of constitutional revolution as the proper concept to account for those changes. Even when the results of those changes

[1] I use the term interpretation as a practice of imposition of meaning on an object, a process constrained by an interplay of semantic and pragmatic factors. However creative and context-dependent the outcome of that practice may be, to the extent that it remains an interpretation and not the creation of a whole new object, it is always the interpretation *of something*.

can be subsumed in the language of the constitution that is allegedly being subverted.

I find this problematic, and the reason for my concern is well expressed in the Israeli case. What, if anything, differentiates a constitutional revolution from exercises of interpretation that, however significant in their impact, remain within the frame of possible meanings covered by the interpreted constitutional provision(s)? As Jacobsohn and Roznai themselves affirm, Justice Barak's opinion was an effort to provide meaning to (i.e. to interpret) the Basic Law: Human Dignity:

> "The content *of the phrase 'Jewish State'* will be determined by the level of abstraction which shall be given *it*. In my opinion, one should give *this phrase* meaning on a high level of abstraction." (p.222, my emphasis)

As abstract the interpretation and as radical as its effects may have been, Barak's wording signals an effort to give meaning to the legal system he is working with, not to subvert it. This is important because it tells us that Barak's reading was one expected to be supported by the text of the Basic Law. So, as radical as the possible departure from previous practice might have been, one could argue that it represented a shift that the Israeli legal system implicitly contemplated, which in turn means that there is really no subversion (or in Jacobsohn and Roznai's language, paradigmatic displacement) of the kind that seems necessary to move from one constitutional regime or paradigm to another.

Given that Jacobsohn and Roznai consider that even interpretations—that is, impositions of meaning to an object circumscribed by semantic and pragmatic constraints—may count as revolutionary, then I wonder: what isn't a constitutional revolution? It seems that there is little left except perhaps very standard interpretations of fairly clear constitutional provisions (to the extent that they exist), the adoption of which would lead to nothing but the repetition of a constitutional status quo.

My conclusion is that the concept of constitutional revolutions could be stronger if tested against a theory of constitutional interpretation. Such theory is absent in Jacobsohn and Roznai's book, alas.

This leads me to express a second concern about the role that Jacobsohn and Roznai see for the people as legitimators of exercises of constituent power by constituted organs. That distribution of labour rests on the understanding that courts present themselves as political actors bringing about political outcomes (e.g. p.182). But this assumption becomes problematic when courts strive to describe their work as one bound by the law and not as driven by revolutionary expectations, as they often do.[2] Of course—as they also often do—courts can hide politics under the language of legality, and generate outcomes of magnitudes sufficient to subvert the constitutional order. But then, what incentives do courts have to link their interpretive practices to some retrospective authorisation by "the people", when doing so would be eventually read as a sign or even as an admission that they are

[2] For example, in *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] A.C. 61; *R. (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41; [2020] A.C. 373.

overstepping the boundaries of their competence; as moving from the legal to the political realm?

There is also a prospective or future-oriented dimension to this problem. If I read it correctly, the argument in the book demands that a substance-centred concept of constitutional revolution be made compatible with a procedural notion of democratic constituent power requiring popular ratification. But, how can the people have the chance to ratify judicial exercises of constituent power when courts present themselves publicly as applying a valid constitution because, since their job is to apply and not to create law, constitutional revolutions cannot happen by their say so? I believe more reflection on the institutionalisation of this division of labour is welcome. In the meantime, the hope that there is a connection between a court-centred constitutional revolution, and a democratic exercise of constituent power, remains doubtful.

Finally, there is something to be said about Jacobsohn and Roznai's conclusion that the exercise of constituent power by courts is tied to the representation of the people for reasons of legitimacy. I have argued against that idea elsewhere,[3] but I can only state the problem here: that conclusion presupposes that courts—as major actors in the process of validation of constitutional revolutions—can potentially be seen as representative institutions. This is debatable. The functional orientation of courts towards the law and not towards making the will of someone present again, implies that courts are not only authorised, but in fact mandated to diverge from some understanding of the will of the people, should their interpretation of the law conflict with that will. So, the expectation that the legitimacy of court activism in revolutionising the constitutional framework will be performed by judges through an active search for the acceptance of the will of the people, is one that is not warranted by the functions that one should expect a court of law to perform. And as mentioned above, it is an expectation that, in fact, courts often resist. This, at least, in my view. I acknowledge, of course, that this is up for debate.

All in all, these considerations are modest quibbles around the edges of a sophisticated and solid book. I invite scholars to read *Constitutional Revolution*. It opens up new conceptual, normative and institutional avenues, and it will be of great interest to constitutional theorists and lawyers alike.

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Limits of Supranational Justice—The European Court of Human Rights and Turkey's Kurdish Conflict, by Dilek Kurban, (Cambridge: Cambridge University Press, 2020), xxv + 383pp., hardback, £85, ISBN: 9781108489324.

In December 2020 the Grand Chamber of the European Court ordered the Turkish authorities to immediately release the Kurdish politician Selahattin Demirtaş (a co-chair of the Peoples' Democratic Party (HDP)). A year earlier, the court had

[3] D. Bello Hutt, "Making What Present Again? A Critique of Argumentative Judicial Representation" (2021) 34(2) *Canadian Journal of Law and Jurisprudence* 259.