

Revolutions and Law

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Abstract

Two broad thematic perspectives can be distinguished in the literature that broaches the revolutions–law nexus. One considers how actors’ relations to, and usages of, legal statutes and constitutional provisions affect the dynamics of revolutionary conjunctures (law in revolutions). The other examines how the dynamics and modalities of revolutionary processes affect the content of law and the configuration of the legal order (revolutions in law). Subsumed to the law in revolutions perspective are five main topics: the use of constitutional provisions as instruments of revolutionary subversion, legally framed defensive strategies, constitutional devolutions, legitimation problems, and the courts’ stances. The revolutions in law perspective encompasses reflections on the status of law in revolutionary paradigms, the impacts of revolutionary events as acts of foundation, shifting conceptions of constituent power, and the issue of continuities coexisting with ruptures. Cutting across these two perspectives are challenges and pitfalls that studies of revolutions and law can hardly ignore: the reification of analytical and descriptive categories, the confusion of normative and positive standpoints, and the reliance on unconditional claims. Studies overcome these challenges when they document and analyze the processes whereby actors engage law as they make decisions and pursue courses of action.

1. INTRODUCTION

A review article devoted to revolutions and law may seem at first sight paradoxical. Studies of revolutions that seek to craft generalizable claims tend to ignore the issue of law. At best, they allude to it from afar. Compendiums on law and its genesis, practice, and implications only rarely delve into the role that rules and regulations play in revolutionary conjunctures. These two bodies of knowledge—social-scientific studies of revolutions on the one hand, compendiums on law on the other—have developed independently from one another.

Furthermore, common sense would quietly invite us to keep these two research themes apart. The emergence of a revolutionary conjuncture hollows out legal regulations. What could be the point of examining the significance of formal regulations in such troubled periods of time? Conversely, legal statutes acquire their regulative validity against the prospect of transformative disruptions. Hence, the focus on revolutions *a priori* lacks relevance for understanding law's effectiveness. Apprehended as themes, revolutions and law repel each other as much as fire and water do. It would therefore seem presumptuous to have them in the same pot or—to use a more noble metaphor—to draw bridges where none could be built.

Approached at the ground level, though, this thematic incompatibility dissolves. One of the arguments advanced in this article is that there is much to learn from investigating how political actors engage legal regulations and institutions in conjunctures marked by the possibility of their breakdown. The ways in which challengers and incumbents draw on legal statutes as political resources, craft claims, and adjust their strategies to legal constraints in these conjunctures highlight crucial modalities of revolutionary contention. Conversely, the crafting of revolutionary models, the twists and turns of acts of constitutional foundation, and actors' efforts to institutionalize a legal order in the wake of a revolutionary event help us understand how various categories of stakeholders engage law.

The task facing a review is how to map out these various plots and subplots. To this end, the present article distinguishes between two broad thematic perspectives, each overlapping with a temporal stage. One explores the role that law, broadly framed, plays in revolutionary times (Section 3). Moving up the temporal cursor, the second thematic perspective investigates the impact of revolutionary events on legal conceptions, practices, and institutions (Section 4). Regarding the formulations of these two themes, a word of caution is in order: These are discursive shortcuts and should be interpreted as such. The penultimate section of this article argues that statements that lo and behold hypostatize either "law" or "revolution" open the door to analytical confusions and heuristic dead ends.

The structure of this review adopts this thematic distinction. Section 2 considers how the literature addressing the revolution–law nexus treats these notions from a conceptual standpoint. Section 3 tackles the problematic of law in revolutions in light of the five main themes that can be culled from the literature relative to this topic: the use of constitutional provisions as instruments of revolutionary subversion, legally framed defensive strategies, constitutional devolutions, legitimization problems, and the courts' stances. Section 4 broaches revolutions in law through an examination of the status of law in revolutionary paradigms, the impacts of revolutionary events as acts of foundation, shifting conceptions of constituent power, and the issue of continuities coexisting with ruptures.

Adopting a critical stance, Section 5 discusses three pitfalls that studies of revolutions and law can hardly ignore: the tendency to reify descriptive and analytical categories; the confusion of normative and positive standpoints; and the reliance on unconditional claims, *i.e.*, claims that are not predicated on conditional factors. Building on these remarks, Section 6 argues that documenting and analyzing the processes whereby actors engage law as they make decisions and pursue courses of action help circumvent these pitfalls. For illustrative purposes, the discussion in this

last section addresses the crafting of innovative claims, the revolutionary appropriation of legal repertoires inherited from institutional times, and the redesigning of normative principles. The coda puts these different points in perspective by emphasizing the frailty of legal regulations in revolutionary conjunctures.

2. CONCEPTS

Each in its own way, the two notions at center stage—revolution and law—encounter conceptual challenges. For revolution, the challenge lies in a profusion of leads and the risk of conceptual inflation (Arato 2017, pp. 260–64). Definitional statements are all over the map. One set of considerations conceptualizes revolution as an outcome whether this outcome is the seizure of state power (“revolutions are successful rebellions” dixit Friedrich 1950, p. 132), the illegitimate replacement of the legal order (Kelsen 1945, p. 117; 1967, p. 209), structural transformation (Berman 1983, p. 20; Linz 1978, pp. 14, 104), the successful transformation of “the governing principles and practices of a basic aspect of life” through collective action (Ackerman 1992, p. 6), the “foundation of a polity” (Preuss 1995, pp. 3–4), the “alteration of the form of government” (Arato 2000, p. 87), the deliberate overturn of the power structure (Ermakoff 2008, p. 22), a “momentous institutional change” combined with a rupture of legitimacy (Arato 2009, pp. 5–7; Kis 1998, p. 311), or a “critical change” in “constitutional identity” (Jacobsohn & Roznai 2020, pp. 15, 21, 37). The more transformative the impact is, the greater its revolutionary significance. Berman (1983, p. 20) labels the six “great revolutions” he includes in his genealogy of the Western legal tradition as “total” revolutions because of the scope of the change they induced.

Some statements explicitly mention violence as a defining characteristic of revolution (e.g., Arato 2000, p. 4; Arendt 1963, pp. 9–10; Berman 1983, p. 20; Bonime-Blanc 1987, p. 8). Others do not mention it or view it as “irrelevant” (Kelsen 1945, p. 117). The fact is that some revolutionary events unfold in ways that observers and analysts characterize as “peaceful” (Kis 1998, p. 325; Preuss 1995, pp. 75, 91). The collapses of Communist regimes in several Eastern European countries in 1989–1990 (e.g., Poland, Hungary, East Germany, Czechoslovakia) exemplify such peaceful processes. Large-scale protests and party leadership responses to this challenge brought about a “dissolution” of the party-state in the absence of violent confrontations (Ackerman 1992, p. 17; Bunce 1999, pp. 5, 152–53; Maier 1997, p. 120).

In drawing attention to the modalities of revolutionary contention, claims about the significance of violence evoke process considerations. A processual approach shifts the focus to “strategies, the making of alliances and the mobilized events that make . . . a transfer of sovereignty possible” (Arato 2017, p. 264). Processes can erupt within a short period of time (“sudden break”) or unfold on the medium run (“evolution”) (Jacobsohn & Roznai 2020, p. 20). At issue more broadly is how to translate empirically claims about the “dialectical quality” of a revolution resulting from the “irreducible duality between an event and a process” (Sultany 2017, pp. x, 98, 104, 106).

At times the presumption that revolutions are geared to “historical projects dedicated to liberation and the establishment of free institutions” (Arato 2017, pp. 80, 105) surfaces in definitional accounts (e.g., Arendt 1963, pp. 21, 140; Abat i Ninet & Tushnet 2015, pp. 30–31; Lawson 2019, pp. 16–17). Yet, history belies this presumption (Aron 1993, p. 127). The premise that the predicate “revolutionary” is synonymous with “inspired by an emancipatory project” unduly restricts the scope of its historical manifestations. By this standard, the Fascist takeovers of the interwar period should not be categorized as revolutionary even though their primary purpose was the destruction of parliamentary democracy and the advent of a party dictatorship. Yet, studies have characterized these events as “legal revolutions” given the legalist tactics adopted by their promoters (Ermakoff 2008, p. 22; Linz 1978, p. 77).

This last point—full-fledged political revolutions can be “legal” (Arato 1994, p. 179; Ermakoff 2023, pp. 1054–57; Loewenstein 1940, p. 894)—brings up the status of law in revolutionary times. Law is, and is bound to remain, a notion difficult to handle because of its multidimensional character and the semantic breadth that this multiplicity of dimensions entails. “The enterprise of subjecting human conduct to the governance of rules,” as Fuller (1969, p. 106) succinctly defines the notion, encompasses multiple types of actions (e.g., governmental decrees, parliamentary bills, judicial decisions); takes on various phenomenal modes (statements, practices, institutions); covers a plurality of domains (constitutional, statutory, procedural); and involves a wide range of actors elaborating its content, enacting its statutes, and deciding over its ambiguities.

Related to this semantically voracious concept is a host of notions that gravitate around it in accounts of revolutions. Sections 3 and 4 tackle several of them: constitution, legitimacy, constituent power, and sovereignty. For now, let us consider the following three, the relevance of which cuts across the different problematics that can be culled from the literature: the legal order, institutions, and legal validity. The legal order can be defined as the patterns of decision making and relations that structure the behaviors of judges, lawmakers, state agents, and subjects (e.g., Kirchheimer 1969, pp. 108–9). Within any legal order, we may distinguish between constitutional rules, statutes, and judicial decisions, each type hypothetically constituting an order in its own sake.

Undergirding a legal order is a set of institutions (the judiciary, legislative assemblies, the government, state organizations). Their breakdown signifies the breakdown of the legal order as well. Conversely, their restoration contributes to its resurgence. Unsurprisingly, given this mutually constitutive relationship between institutions and order, accounts of revolution and law frequently refer to the former. Definitional statements, however, are relatively rare, and the pictures they sketch do not necessarily match one another. One set points to a heteroclitic assemblage of “rules and roles, interests and identities, practices and principles” (Lawson 2005, p. 35). This conception gives credence to a broad depiction of institutions as a “structural arrangement for performing specific social tasks” (Berman 1983, p. 5; Huntington 1996, p. 10) and “ways of living and doing” (Llewellyn 1934, p. 17). An alternative conception harnesses institutions to formal rules, i.e., rules stated in writing or precise and explicit enough so that they could be transposed in writing (Aoki 2014, p. 32; Roeder 1993, p. 8). An institution from this perspective designates “a set of interrelated and explicitly stated rules that actors take into account as they interact with one another in a domain of activity” (Ermakoff & Grdešić 2019, p. 565). Institutionalization accordingly describes the process whereby these rules get implemented and acquire their regulative grip.

Validity in a legal sense is at the confluence of several meanings. The formal validity of a legal act denotes the consistency of its content with rules conditioning its existence. The phenomenal validity (my term) of regulations, which Weber (1978, p. 32) labels empirical and Habermas (1996, pp. 29–30) labels *de facto* validity, is indexed on their effectiveness. The extent to which formal rules are in effect does not, however, provide a gradient of the rules’ normative validity, that is, the extent to which stakeholders vest value in their existence. Normative validity understood in this sense can hardly be analyzed without considering how courts, state agents, and subjects relate to one another (Fuller 1969, pp. 104–8; Raz 2009, p. 89). In different degrees, all three modes of validity—formal, phenomenal, and normative—can be objects of contention in times of revolutionary challenge.

3. LAW IN REVOLUTIONS

Claims and observations regarding the ways in which the protagonists of a revolutionary conjuncture relate to law writ large can be sorted into five main themes. One describes revolutionaries’ use of legal statutes as a political weapon against the regime that they seek to topple (Trojan horses). A second theme concerns defensive strategies. These are of two kinds. Institutional responses

include the adoption of measures intended to erect or consolidate a regime's lines of defense (e.g., legal bans directed at revolutionary groupings and provisions forbidding amendments that would change the normative principles undergirding the constitution). States of emergency and constitutional dictatorships describe legal setups that suspend parts of the constitution to fend off threats that incumbents perceive as vital. The third theme (devolutions) depicts a type of regime change brought about by a legal transfer of power to revolutionary contenders. A fourth theme present in the literature emphasizes the issue of legitimization. The fifth theme narrows the focus on the courts' stances.

3.1. Trojan Horses

The Fascist technique of power conquest in the interwar period exemplifies the instrumental use of law for revolutionary purposes in democratic polities (Bracher 1962, p. 117; Ermakoff 2008, pp. 21–22; Loewenstein 1937a, pp. 423–24; Neumann 1963, p. 42; Thamer 1986, p. 280). The technique consisted in (a) playing the institutional game of politics to access legislative or executive positions, (b) using these positions to disrupt the working of political institutions, and (c) acquiring an exclusive control over state power through conjunctural and structural uses of constitutional provisions. A conjunctural use undercuts the political capacity of potential or actual opponents. A structural usage redesigns the rules of the game by taking advantage of “constitutional Trojan horses”—that is, “legal statutes with which revolutionary challengers can engage in strategies of institutional subversion from within” (Ermakoff 2020, pp. S166, S179, S184).

Hitler, acting as premier of a coalition cabinet, played these two cards in February–March 1933 as he issued executive decrees legalizing political repression and requested from parliament an enabling bill granting him the right to modify the Weimar constitution [Schneider 1968 (1953)]. Once this bill was passed on March 23, 1933, National Socialist leaders made a great case of the legality of their “revolution” (Jasper 1986, p. 138; Richter 1986, p. 104). Jurists who cast their lot with the new regime extolled a process that in their view did not breach the Weimar constitution (Dannemann 1985, pp. 11–12; Dreier et al. 2013, pp. 21–22). By contrast, jurists committed to parliamentary democracy denounced the “legality” of the transition process as an “official legend” (e.g., Fraenkel 1941, p. 4; Friedrich 1950, p. 150).

Contemporary cases of legalist strategies of institutional subversion abound. To cite the most prominent examples: Over the past two decades, the leaders of the United Socialist Party of Venezuela, the Justice and Development Party in Turkey, the Fidesz party in Hungary, the United Russia party in Russia, and the Law and Justice party in Poland have taken steps to undercut the ability of opposition parties to mount effective electoral challenges. Law is the linchpin of these strategies of democratic debilitation. Hugo Chávez (Venezuela), Recep Tayyip Erdoğan (Turkey), and Viktor Orbán (Hungary) either drew on or devised legal provisions to consolidate and expand their grip on politics (Bánkuti et al. 2012; Bermeo 2016, p. 11; Corrales 2015, p. 40; Ginsburg & Huq 2018, chapter 4; Landau 2013, pp. 195–216; Sadurski 2019, chapters 3–5; Scheppele 2015; 2018, pp. 549–56; Turam 2012, p. 109). These contemporary cases, as well as the Fascist takeovers of the interwar period, raise the question of the extent to which a given constitutional framework creates opportunities for constitutional Trojan horses.

3.2. Defensive Responses

The range of legal tactics deployed to counteract a revolutionary offensive is quite wide. These tactics differ with regard to their institutional status (constitutional, legislative, executive, or judicial), the type of action they target (paramilitary mobilization, propaganda, defamation, political disturbances, electoral bid, institutional subversion), and the legal justification for their enactment. This last consideration outlines two modes of tactical defenses. One draws on existent bans and

regulations. The other rests on the ability to declare a state of emergency and resort to policies overstepping, or suspending, limits to state power as stipulated by the constitution. At times, these two modes of counteractions overlap with one another. Incumbents can invoke a state of emergency to erect new institutional safeguards against revolutionary contenders. Conversely, they can modify the statutes regulating their formal capacity to suspend constitutional checks.

3.2.1. Institutional safeguards. Regulations intended to protect a regime against a revolutionary threat are of various kinds (Capoccia 2005, pp. 56–57). The safeguards they erect can be figuratively represented as lines of defense laid out around legislative and executive institutions. Bans on organizations that incumbents deem dangerous set the first barrier (Ellian & Rijkema 2018, p. 2; Loewenstein 1937b, p. 645). Statutes and decrees barring political contenders from electoral competition provide a second protective ring (Brecht 1968, p. 255). Next come regulations of political actions that jeopardize the legal order, such as the formation of military bands, the use of firearms, the disturbance of assembly and meetings, defamation, slandering, and the exaltation of political criminals (Kirchheimer 1961, chapter 4; Loewenstein 1937a, pp. 430–31; 1937b, pp. 649–52).

Constitutional articles that declare the form of government and the state's political structure to be unalterable may be regarded as the ultimate protective shield against attempts to modify the “genetic code” of the constitution (Roznai 2017, p. 38). Fulfilling a “preservative” function (Albert 2010, p. 666), these articles in effect attach a clause of eternity to the provisions stipulating the constitutive principles of the political regime (Albert 2009, p. 9; 2010, p. 666; Fox & Nolte 1995, p. 19; Issacharoff 2015, pp. 47–48; Klug 2015, p. 99; Roznai 2017, p. 23). In the case of constitutional democracies, the purpose of these unamendable provisions is to entrench the democratic integrity of legislative and executive institutions (Ginsburg & Huq 2018, pp. 173–75; Scheppele 2018, p. 563).

This last observation raises the questions of the scope of, and the justifications for, the so-called militant democracy approach, that is, “the adoption and implementation of legal instruments that curtail rights of expression and participation based on political viewpoint” to fend off authoritarian power bids (Capoccia 2013, p. 209). At the center of scholarly exchanges stand two main topics: the normative acceptability of legal restrictions and their political efficacy. Insofar as a militant democratic stance abridges the political rights of specific actors, it exposes itself to the charge of being intolerant, antidemocratic, and therefore normatively inconsistent (Capoccia 2005, p. 60; Ginsburg & Huq 2018, p. 171; Macklem 2006, p. 505). Further, repressing actors instead of actions may turn out to have “the opposite effect than the one intended” if it opens the door to arbitrary extensions of political bans (Accetti & Zuckerman 2017, pp. 183–84), or makes targeted actors appear to be the victims of power abuses (Issacharoff 2015, p. 122).

Although the political impact of legal restrictions cannot be appraised *a priori* without examining the dynamics of coalitional prospects among actors who have a stake in the preservation of the constitutional order (Capoccia 2005, pp. 5–26), normative vindications of militant democracy have been pitched at both general and specific argumentative levels. The general justification refers to fundamental democratic norms. Because in a democracy “governments have the duty to safeguard the effective franchise of both the majority and the minority,” they also “have the obligation to ban incitement to revolution” (van den Haag 1955, p. 62). Similarly, democracy implies the collective capacity of mastering one's fate. This means the possibility “for the people” of revoking decisions through a process of “self-correction” (Rijkema 2018, p. 11). Such a possibility is incompatible with the prospect of democracy's abolishing itself (Rijkema 2018, chapter 3). Within this broad normative framework, specific militant democracy measures such as party bans can be vindicated by examining whether a revolutionary contender violates, or intends to “violate, the rights of others” (Kirshner 2014, p. 27; Müller 2012, pp. 1267–68).

Provided that the incumbents have adequately sized up a revolutionary threat, two conjunctural factors condition institutional strategies of regime preservation. First, devising and shoring up institutional lines of defense requires that groups with a stake in the preservation of the regime join forces. When the fate of democracy is imperiled, “stable political coalitions” backing institutional strategies of defense are a necessity (Capoccia 2005, p. 207). Yet, a history of competitive and conflictual relationships often pulls stakeholders apart, thereby undercutting the prospect of collaboration when it is most needed. Second, and relatedly, institutional responses take time to devise and implement. In times of emergency, the incumbents may find themselves cornered by insuperable time constraints.

3.2.2. Emergency power. The formal regulation of emergency powers constitutes a second type of legalist responses to a revolutionary threat. This legalist response can be managed through (a) ordinary statutes enacted by the legislature or (b) constitutional provisions justifying and regulating the suspension of institutional procedures. In the legislative scenario, the legislature declares the emergency, “creates the powers to deal with it,” and supervises the executive’s use of these powers (Ferejohn & Pasquino 2004, pp. 217–18).

In the typical constitutional scenario, on the other hand, the exercise of emergency power eludes the legislature’s supervision for a given period. The powers thus granted to the actor called upon to resolve the emergency are akin to those of a dictator. This model of emergency government harks back to the Roman institution of dictatorship (Levinson & Bolkin 2010, pp. 1805–9; Nicolet 2004, pp. 263–68; Rossiter 1948, p. 5). It rests on the specification of formal appointment procedures, term limits, clear-cut objectives, and the distinction between the legislator and the executor of the dictatorship (Friedrich 1950, p. 238; Rossiter 1948, chapter 2). Four dimensions are relevant to classify the constitutional provisions regulating the appointment of a Roman-style dictator: “(1) who declares emergency, (2) who exercises these powers, (3) who declares the end of the emergency, and (4) who can interfere with or adjudicate legal questions” pertaining to the exercise of emergency powers (Ferejohn & Pasquino 2004, p. 230).

Whether the setup is legislative or constitutional, the ultimate objective of the design *in fine* is to safeguard the constitutional order (Finn 1991, pp. 15–21; Friedrich 1950, p. 246; Kuo 2020, p. 22). That is why the power transfer is intended to be temporary—conditional on the existence of a revolutionary threat—and subsumed to procedures of control. Contra depictions of these states of exception as irremediably beyond the reach of legal norms (e.g., Agamben 2005, pp. 28–29; Schmitt 1985, p. 5), the reference to law maintains the existence, or the prospect, of a regulative order (Dyzenhaus 1997, pp. 129–31; 2006, pp. 2, 58; Heller 1992, pp. 332–33).

With regard to the goal of constitutional preservation, each setup has its own pros and cons (Watkins 1939, chapter XII). The constitutional scenario has the advantage of providing a ready-made procedure that can be swiftly implemented. Its drawback lies in the risk of a dictator who takes the opportunity of an unsupervised margin of maneuver to extend his control of the state and alter the rules of the game (Ferejohn & Pasquino 2004, pp. 218–19; Roznai & Albert 2020, p. 3). It can be argued that the legislative scenario makes an autocratic takeover more difficult to achieve, although caution is required for any comparative likelihood assessments of this kind (Ginsburg & Huq 2018, pp. 135–37). However, the legislative venue may also lack the swiftness that the urgency of the situation calls for.

3.3. Devolutions

Faced with a revolutionary challenge, incumbents may decide to let revolutionaries reshuffle the rules of the game. Thereby, they consent to undercutting the institutional setting that safeguards their collective ability to defend their interests. Whether the regime at stake is authoritarian or

democratic, constitutional devolutions imply acts of collective renunciations (Bunce 1999, p. 5; Ermakoff 2008, pp. 53–54; Johnson & Schlemmer 1996, p. 8). The change in power structure takes place within the legal framework of the regime under challenge (Arato 2000, p. 91; Ermakoff 2008, chapter 2; 2020, pp. S169–73; Jacobsohn & Roznai 2020, chapter 1; Preuss 1995, p. 8).

The scuttling of the Franco regime in Spain belongs to this class of regime change (Bonime-Blanc 1987, p. 25; Sánchez-Cuenca & Medina 2019), as do the repudiation of Communist regimes in the Soviet bloc in 1989–1991 (Arato 2017, pp. 187–94); the end of the apartheid regime in South Africa (1990–1994) (Issacharoff 2015, chapter 8; Jung & Shapiro 1995, pp. 283–92; Klug 2000, chapter 4; Lawson 2005, chapter 4); and the political transitions in Chile (1988–1990) (Lawson 2005, chapter 5), Brazil (1986–1988), and Argentina (1983) (Weyland 2014, chapters 6–7). Constitutional devolutions also characterize authoritarian revolutions such as the advent of the Fascist regime in Italy in 1922–1924, the establishment of the Nazi dictatorship in Germany from 1933 onward, and the creation of the Vichy regime in France in 1940 (Ermakoff 2008, preface, chapter 1).

A key difference across regimes concerns the genesis and modalities of such acts of devolution. In authoritarian regimes, incumbents and challengers are likely to conjointly initiate the process (e.g., Kennedy 1999, p. 297; Osiatynski 1996, pp. 26–30; Sajó 1996, pp. 71–72). They “negotiate” reforms and, eventually, a change in the organization of political power (Adam & Moodley 1993; Bruszt 1990, p. 368; Jung & Shapiro 1995, pp. 278–83; Kis 1998, p. 311; Lawson 2005, p. 76, chapter 6; Tökés 1996, chapter 8). By bargaining the sharing of state responsibilities with their revolutionary challengers, they bet on their ability to consolidate their position and to remain in command to a certain extent (Przeworski 1991, pp. 57, 65).

In democratic regimes, by contrast, it is the revolutionary challengers who initiate the process. Fascist leaders are prime examples. In July 1923, Mussolini and his lieutenants submitted to the Italian Chamber of Deputies a bill—the Acerbo bill—that granted a supermajority of two-thirds of the seats in the chamber to the party obtaining the highest number of votes beyond the 25% threshold. The Italian Senate endorsed this electoral law in November 1923. Catholic party deputies passed the law even though in doing so they were scuttling their party’s political capacity and paving the way to the political hegemony of the Fascist party (Di Scala 2004, p. 252; Neville 2004, p. 58).

3.4. Legitimation and Its Problems

The previous remarks address the political significance of law in revolutions by examining how challengers and incumbents use statutes and constitutional provisions for either offensive or defensive purposes. Statements that invoke the notion of legitimacy implicitly invite us to consider a more diffuse, and thus indistinct, collective, a collective that most often remains in the background because of its indistinctiveness: polity members as they relate to power claims, legal regulations, and their bearers (e.g., Ackerman 1992, 2014, 2019; Arato 2016, pp. 135–39; Jacobsohn & Roznai 2020, pp. 7–8; Sultany 2017, chapter 8).

Legitimacy in this discursive context is amenable to two meanings. Analysts label the first meaning sociological in reference to Weber’s (1978, pp. 31, 213) delineation of the concept as denoting the belief in the rightness and binding character of a request for obedience or a system of rules (Arato 2009, p. 5; 2017, pp. 11–15; Habermas 1975, pp. 97–98; Hyde 1983, pp. 381–82; Sultany 2017, p. 4). The second meaning implies a normative appraisal. The coordinates and content of this appraisal, however, are not easy to pin down. For some analysts, they are to be found in the reasons for the belief in legitimacy, their relations to values such as truth and justice, and the

possibility to justify them (Arato 2017, p. 16; Habermas 1975, pp. 98–105; 1996, p. 30; Preuss 1996, p. 109). Most usages lack this level of specification: They proceed under the broad understanding that legitimacy “stipulates the conditions according to which the exercise of coercive power of the state is morally permissible” (Sultany 2017, p. 4).

The dominant theme on this score emphasizes legitimacy deficits and surveys the whole gamut of time frames encompassing a revolutionary upheaval: before, during, and after an event. One set of studies evokes polity members’ rejection of, or disaffection with, the regulative setting to which they are exposed before a regime overthrow. Underlying this focus is a close attention to how contemporaries’ practical understandings of, and relationships to, legal conceptions shape the ways in which they react to policies and governmental requests (Greene 2010, p. ix). Significant in this regard is the extent to which the content and reach of legal practices and the sources of authority that these practices display—what John Reid (1977, p. 2, chapter 3) describes as the “conditions of law”—contribute to a sense of control and entitlements (Greene 1986, p. 63; 2010, p. 139; Nelson 1974, pp. 31–32; Reid 1977, p. 11; 1979, chapter 1). An inquiry along these lines brings into relief which rights were at the center of the colonists’ legal interests in prerevolutionary America (Reid 1986, chapter 1) and the “static, customary, prescriptive constitutionalism” that infused their legal representations (Reid 1993, p. 5).

Revolutionary situations approached from this thematic perspective get portrayed as a twofold break of legality and legitimacy (Arato 2017, pp. 5–7; 2017, p. 262; Kis 1998, p. 311). The regime’s power structure is collapsing. A new structure has not yet taken shape. Revolutionaries thus find themselves between two political orders. They “must look forward and backward in time. They need to repudiate a prior state of affairs and to provide a foundation for a stable future” (Kay 2014, p. 1). Herein lies the “gaping legitimacy problem” they face (Arato 2017, p. 81). In such conditions, restoring or preserving a judiciary system on the ground is likely to be quite challenging. A telling example is Syrian revolutionaries’ endeavors to restore judicial order in the areas that were under their control in 2012–2013. Their choice of a legal code reflected the practical necessity to elicit acceptance among the local population (Baczko et al. 2018, pp. 118–24).

Legitimation problems subsequent to a change of regime depend on the *modus operandi* of the change and the intensity of the ensuing conflicts (Sultany 2017, p. 238). The passing away of the generation who came to power at the head of an insurrection opens up a “legitimacy vacuum” for the revolutionary regime. Judges step in to claim “ultimate constitutional authority” (Ackerman 2019, pp. 7–10). However, they lack the legitimacy credentials of the founding fathers. When, on the other hand, “pragmatic insiders” negotiated with “reasonable outsiders” a change of regime, it becomes subsequently difficult for power holders to claim that they have been acting on behalf of the “people” (p. 4). The likelihood of these various developments can be hypothesized to be conditional on power holders’ ability to ground new political institutions in some form of political continuity (Arendt 1963, pp. 164–65) and polity members’ capacity to take part in a “tradition building project” (Habermas 2001, p. 774).

3.5. The Courts’ Stances

In contexts marked by the prospect or the realization of revolutionary changes, courts have the opportunity to restate the normative principles that undergird the constitutional order (Dyzenhaus 1997, p. 130; Heller 1992). A standing example is the Colombian constitutional court’s decision to strike down a constitutional amendment allowing a third presidential term to President Álvaro Uribe (2010). The court invoked the need to safeguard “the principle of separation of powers and the system of checks and balances” (Issacharoff 2015, p. 150; Gamboa 2022, p. 129; Ginsburg & Huq 2018, pp. 187–88). In conjunctures of regime transitions, judges can be called upon to

state “through constitutional interpretation, to whom or to which institution the power to decide particular matters has been constitutionally assigned” (Klug 2000, p. 152).

Shifting the focus on courts brings two topics into salience. The first concerns the stances that courts take. It is one thing to say that “judges are under a constitutional duty to uphold the rule of law” in emergency times (Dyzenhaus 2006, pp. 4, 67) and that they have the ability to assert “democratic safeguards” (Issacharoff 2015, p. 14). It is quite another to observe them breaking their silence and reaching decisions that are up to these normative expectations. Courts at times fail to exercise judicial review. They may also prove to be “‘executive-minded’ in their deference to the executive” (Klug 2000, p. 139). As the case of Chile in the last third of the twentieth century illustrates, judges “trained and appointed by democratic governments” can “facilitate and condone authoritarian policies” (Hilbink 2007, p. 4).

The second topic of interest concerns the political impact of judicial interventions. The courts’ capacity to sway executive officers’ and legislators’ courses of action cannot be viewed as a foregone conclusion. Analyzing the conditions under which they acquire this capacity invites us to inquire into political actors’ decisional equation as they choose whether to abide by constraining judicial rulings as Section 7 of this article underlines.

4. REVOLUTIONS IN LAW

Let us now reverse the perspective and consider how revolutionary events impact the practice and the conception of law. Four thematic threads can be discerned in the literature. One points to the significance of past events elevated to the status of models. The paradigmatic status of these events becomes visible in historical periods marked by waves of ideologically congruent mobilizations. A second thread shifts the attention to processes of constitution making. The third thematic thread complements the second one through the lens of theories of sovereignty and constituent power. As for the fourth thread, it is centered on continuities and ruptures. Revolutionary events do not abolish legal regimes in their entirety. They leave some domains of law unaffected while significantly transforming the conceptions prevailing in others.

4.1. Events as Paradigms

Revolutionary events tend to occur in waves. That is, by the standard of the *longue durée*, they tend to cluster in relatively close temporal proximity. In addition, within a given cluster, their modus operandi and objectives are often consonant (Elster 1995, pp. 368–69; Huntington 1993, pp. 16–25; Palmer 2014, chapter 1). Underlying this isomorphism of methods and projects are several processes (Weyland 2014, chapter 1). One is the emulation provided by actions opening the realm of the possible (Baczko et al. 2018, p. 71). Another is the demonstration effect of a successful challenge (Beck 2014, p. 215). Still another is the influence of past events elevated to the status of models.

The list of revolutions that in one way or another and at different periods in time became for some groups exemplars of what needed to be accomplished is a long one. Let us mention (among others) the 1688 Glorious Revolution in England, the American and French constitutionalist revolutions at the end of the eighteenth century, the Bolsheviks’ capture of state power in Russia (1917), the Fascist takeovers in Italy and Germany, the peasant-based insurrectional war in China, the Cuban guerilla movement, Spain’s and Portugal’s democratic transitions (1975–1976), the Islamist revolution in Iran (1979), the negotiated scuttling of Communist regimes in Poland and Hungary (1989), the Rose Revolution in Georgia (2003), and the successful mobilizations against autocrats in Tunisia and Egypt in the winter of 2011.

To the extent that events abstracted as models provide revolutionary contenders with both objectives and methods, they acquire for these contenders a paradigmatic status: They “orient the actors toward certain goals,” and they “set limits upon the methods that may be used to reach these goals” (Sohrabi 1995, p. 1384; see also Ackerman 2019, pp. 11, 19; Arato 2017, preface, chapter 3; Sohrabi 2011, pp. 5–7). As such, these paradigmatic events articulate an ideological vision with a script for political action, i.e., a way of “defining the situation” and of “setting out the manner of its unfolding” (Baker & Edelstein 2015, pp. 2–3).

A case in point is the script implemented by the proponents of the constitutional revolutions in Russia (1905), Iran (1906), and the Ottoman Empire (1908) (Arjomand 1988, chapter 2; 1992, pp. 54–56; Sohrabi 1995). These revolutionary mobilizations shared calls for the creation of a legislative assembly, the separation of the legislative and the executive, and a constitutional framework ensuring a balance of power between representative institutions and executive offices. The ideological glue holding these different pieces together was a representation of the French Revolution (1789) extolling the transformative role of legislative institutions (Sohrabi 2011, pp. 6–7).

The normative influence of a paradigm inherited from the past can be assessed in light of the courses of action it prevents. In the Ottoman Empire in 1908, the members of the main revolutionary organization, the Committee for Union and Progress, who were endorsing a constitutionalist model inspired by the French Revolution, also believed that the use of violence “contradicted the spirit and the letter of the law” (Sohrabi 2011, p. 18). Equally significant is the fact that because of their commitment to the principle of a legislative assembly supervising the executive branch, Ottoman officers taking part in the Committee “refused to capture the executive on several occasions” (p. 24).

This example points to the ideological impact of a revolution paradigm on legal norms. Inherent to any model of revolutionary transformation is a normative understanding of the relationships between law and politics. Revolutionaries bet on the superior—from their viewpoint—normative and regulative clout of the power structure they seek to institutionalize. This is not to say, however, that revolutionary models are equally explicit regarding this normative understanding. When revolutionaries view legal regulations as an adjustment variable, they have no incentive and little reason to explicate their template in legal terms. Law then amounts to a form, the content of which is bound to be filled up by power imperatives. When, on the other hand, revolutionaries do not conceive politics outside the bounds of a constitution and posit the effective regulation of politics through this framework, we can expect their model to be legally explicit.

The Communist and Fascist templates exemplify a normative vision of the constitutional order as shadow plays, a way of drumming up ideology at the expense of the rule of law (Arjomand 2003, p. 9; Neumann 1963, pp. 447–48). The model of “sovereign dictatorship” (Arato 2017, p. 426) initiated by the Bolshevik takeover of 1917 made the leadership of the Communist party the exclusive bearer of Socialist legality (Ackerman 1997, p. 781; Sohrabi 1995, p. 1386; 2011, pp. 9–13). In a consonant fashion, the Fascist template derived from Italy and Germany in the interwar period “did not require formalization of political power, which, however sweepingly formulated, would have been a limitation on its exercise” (Loewenstein 1951, p. 199). The status of law was left at the discretion of the almighty leader who, because he embodied the nation, by the same token identified himself with the ultimate source of legal foundation (Fraenkel 1941, p. 13). As Carl Schmitt approvingly explained a few months after the National Socialist takeover, “law is no longer an objective norm, but a spontaneous emanation of the ‘Führer’s’ will” (cited by Loewenstein 1936, pp. 803, 811).

By contrast, the constitutionalist model bequeathed by the American and the French Revolutions at the end of the eighteenth century portrays constituent assemblies as the principals of a legal order regulating state power (Arato 2017, chapter 2; Arjomand 2003, p. 9; Loewenstein 1951,

p. 195). Constitutional regulation is to prevail over revolutionary politics (Rakove 2015, p. 105). More recently, the regime changes in Spain (1976–1977), Poland (1989), and South Africa (1990–1994) have been paradigmatic instances of a model of revolutionary transition characterized by a two-stage process in which a provisional constitutional arrangement prepares the ground for, and regulates, the making of a constitution (Arato 2017, p. 186). At the opposite end of the ideological spectrum, the Iranian Revolution begot a model of theocratic government grounded in the constitutional principle of the “Mandate of the Jurist,” which consecrates the supreme power of the Imam (doctrine of *velayat-e faqih*) (Arjomand 1988, pp. 150–51; 1992, pp. 70–71).

As these few remarks underscore, in periodizing scripts and ideological visions, revolutionary paradigms also periodize legal conceptions and practices. Their global character during episodes of revolutionary contention is a gradient of their historical significance. Although this observation applies in the first place to the constitutionalist revolutions of the 1990s (Ackerman 1997; Arjomand 2003, p. 9; Go 2003, pp. 77–78; Klug 2000, chapter 3), it can be generalized to previous models of revolutionary mobilization.

4.2. Acts of Foundation

When the focus on moments of constitutional foundations gets magnified, several observations stand out. First, revolutionaries often decide to engage in constitution making before political stabilization is secured. The “rebels of 1776” opted to write a constitution “in the midst of a revolution” (Kenyon 1979, p. 91). Similarly, the members of the French National Assembly started their constitutional deliberations while political turmoil was the order of the day (summer 1789). In China, efforts to have parliament write a permanent constitution punctuated the two chaotic decades that followed the Xinhai Revolution (1911) (Nathan 1976, chapters 4–7). Plans for the convening of a constitutional congress in Mexico surfaced in 1915 as infighting among revolutionary competitors was spreading (Knight 1986, p. 470). When a constitutional congress met at the Querétaro Palace of Fine Arts in the fall of 1917, large portions of Mexican territory were still under the sway of revolutionary contenders [Knight 1986, p. 471; Niemeyer 1974, p. 31; Tannenbaum 1966 (1933), p. 166].

Second, constitutional deliberations take place in quite diverse formal settings: constitutional conventions whose task is solely the elaboration of a constitution (e.g., the 1787 Federal Convention in Philadelphia), constituent assemblies exercising legislative and executive functions in addition to constitutional ones (e.g., the French *Assemblée Constituante* in Paris in 1789–1791), national conferences, constitutional commissions, and collective organs of decision making of an oligarchic character (e.g., the Eighth Party Congress of the Bolshevik party, March 1919) (Arato 2000, pp. 232–34; 2017, p. 259; Elster 1993, p. 182; Martin 2001, p. 3; Negretto 2018, p. 32).

Third, a shared political culture does not predetermine institutional preferences. Under the broad heading of republicanism, constitution making in 1776 in America yielded a wide range of arrangements across provincial congresses regarding the scope of the executive office, the relations between the legislative and judicial branches, the structure of the legislature, veto power, and property qualifications for suffrage (Bodenhamer 2012, pp. 43–51; Palmer 2014, pp. 163–71; Wood 2021, chapters 4 and 5). Constitutional proposals were prolific (Kenyon 1979, pp. 99–115; Wood 2021, p. 240). In some cases, delegates resurrected old charters (e.g., Massachusetts). In others, they were tempted to reject any format setup inherited from the past (Wood 2021, pp. 130, 226).

Fourth, provided that the purpose of a constituent assembly is not to rubberstamp a document imposed by the executive (e.g., the Algerian National Assembly in summer 1963; Arjomand 1992, pp. 63–64), the collective dynamics susceptible to emergence in these moments defy predictions.

Possibilities open up and close. Actors strategize, often in creative ways, either to take advantage of openings or to create them (Goldwin 1997, chapters 1 and 3; Matson & Onuf 1990, p. 105; Riker 1984, pp. 14–15). Interests of various stripes and scopes—ideological and material, individual and collective—intersect with emotional reactions, compromises, and alignment processes (Elster 1994, pp. 74–80; 1995, pp. 376–86, 390; Rakove 1987, pp. 424–26). Along the way, constitution builders adapt, translate, and modify scripts and templates (Arjomand 1992, pp. 39–40; Ewald 1994, p. 8; Klug 2000, pp. 5, 11; Sohrabi 2002, p. 46). The dynamics of position taking at the Federal Convention of 1787 epitomize the complexity at play (Jillson 1981, pp. 607–9; Nelson 1987, pp. 466–74; Riker 1984, pp. 3–13; Slez & Martin 2007, pp. 50–62). “No one could have foreseen the processes by which the new constitution had been constructed” (Farrand 1913, pp. 200–1).

4.3. Constituent Power

The foundational significance of revolutionary caesura draws attention to the normative underpinnings and modalities of constituent power. Scholarly debates on this front have been centered on two interrelated issues: (a) the conceptual and normative difficulties in which representations of constituent power based on the notion of popular sovereignty remain embroiled and (b) the normative justifications of the power to establish constitutional rules.

Historically and ideologically, there is a close affinity between the ideology of popular sovereignty and the conception of revolutions as shifts in political organizations enacted by mass mobilizations (Arato 2017, p. 105; Baker 1990, pp. 261–70). “The idea that the foundation of a polity was a deliberate act of constituent power” is predicated on the belief that people can decide their collective fate (Preuss 1995, p. 4). Popular sovereignty, elevated to the rank of “genuine foundation of the polity” (p. 16), translates this belief into political terms.

This ideological background notwithstanding, the doctrine of a constitutional foundation stemming from popular sovereignty stumbles on (a) the fundamental hiatus implied by an act of foundation and (b) the “*petitio principii*” (Arendt 1963, p. 160) on which the doctrine rests. The exercise of constituent power implies a “revolutionary hiatus,” “a condition *ex lex*” (Arato 2000, p. 237; Kalyvas 2005, p. 231). The exercise of constituent power thus cannot be grounded on the rule of law (Preuss 1995, p. 9), even less so when political theorists [e.g., Böckenförde 2017 (1986); Negri 2009, p. 20] emphasize the “unbounded” nature of this exercise (Rubinelli 2020, p. 147). The *petitio principii* of constituent power lies in the presumption either of “constitutional forms” that are yet to be established (Loughlin & Walker 2007, p. 1) or of a “people” that precedes sovereignty and is nonetheless in the process of being constituted (Arato 2017, p. 34).

Hence, according to Arato (2017, pp. 1, 23–30), it is necessary to acknowledge the empirical fallacies and normative hazards inherent to (a) a conception postulating a unitary locus of constitutional making and (b) the fiction of unlimited popular sovereignty. Arguments of continuity may be interpreted as attempts to get out of these fallacies and aporias either by invoking the permanence of forms of representation or participation (Arendt 1963, p. 165) or by implementing a procedure of regime transition that both incumbents and challengers endorse.

In this second scenario, constitution making involves a “negotiated process among groups” (Klug 2000, pp. 105–10; Preuss 1995, p. 95; Weingast 1997, p. 253) whose co-involvement can be adequately understood only if premised on norms of equality and reciprocity (Habermas 2001, pp. 776–78; Kalyvas 2005, p. 236). “Constitutionalism” then gets “reconciled” with the prospect of a revolutionary transformation (Teitel 1997, p. 2051). The procedures implemented in Spain (1976–1977), Poland (1989), and South Africa (1993–1995) to devise democratic institutions exemplify a multistage and multi-actor constituent process. Its political justifications stem from the rules that bound it (Arato 2017, chapter 3; Kurczewski 2003, p. 165).

4.4. Continuities and Ruptures

Constitution making does not exhaust the reality of the legal order emerging from a revolutionary event. For one thing, a constitutional framework is no warrant of its institutional reality. A revolutionary constitution may prove unworkable, however grounded in political theory it might be (e.g., the French Constitution of 1791) (Baker 1990, p. 303; Loewenstein 1922; 1951, p. 195). It may also prove vague, abstract, and inconsistent (Sultany 2017, pp. x, 200). Moreover, constitutions vary with regard to their phenomenal validity, as defined previously. A constitutional framework can be said to be real or normative when it is “fully activated and effective” (Loewenstein 1951, p. 204); nominal when it describes “a system of limitless, unchecked power”; and façade-like or fictional when the rights it asserts are “dead letter” (Sartori 1962, p. 861), as in the case of Soviet-type regimes (Arato 1994, p. 179; Aron 1965, p. 244).

Compounding the matter further, principals and agents can significantly refract the content of statutes as they enact them. Even if we assume that the content of a set of laws is unambiguous and noncontradictory, actors at different levels of organizational responsibility and embedded in various action systems may be in a position to carve for themselves some leeway in deciding to which extent they want to promote, hamper, or hollow out the rules on the books. Practices on the ground coupled with the representations that make sense of them ultimately constitute the phenomenal reality of a legal order.

Fraenkel (1941, p. xv) made this point in the case of Nazi Germany by documenting before the onset of the Second World War the “duality or concurrent existence of a ‘normative state’ (‘Normenstaat’) that generally respects its own laws, and a ‘prerogative state’ (‘Maßnahmenstaat’) that violates the very same laws.” The prerogative state subsumed legal reasoning and decisions to the political requirements that National Socialist Party leaders defined as such. It therefore implied the “dissolution” of the rule of law and the “abolition of legal restraints” (Fraenkel 1941, pp. 14, 16; Stolleis 1998, p. 2). Alongside this political use of law, the “normative state” rested on the permanence of predictable legal rules in some spheres of activities, such as business transactions (Fraenkel 1941, chapter 3; Meierhenrich 2018, pp. 38–39).

Thus, in addition to examining changes in the “structure of a legal system” (Green 2005, p. 335), a problematic centered on “continuities and ruptures” (Finnis 2011, p. 426; Kay 2014; Kirchheimer 1969, pp. 98–99; Rivetti 2015, p. 3; Sultany 2017, chapter 5, p. 265) can hardly avoid specifying, for the various domains of activity constitutive of law, which time frame is taken into account and, given the time under consideration, who the stakeholders are, in which systems of action they are embedded, how they perceive the stakes inherent to their decisions, which factors configure their interests writ large, what the scope of their decisional autonomy is, and the extent to which they view their decisions as constrained by formal criteria of consistency (e.g., Aziz 2016, pp. 722–28; Brown 2015, pp. 35–37; Jasch 2013, pp. 37–38; Hilbink 2007, chapters 1 and 4; Luong 2002, chapters 1 and 2).

5. PITFALLS AND CHALLENGES

The observations culled in the three previous sections bring into relief three main challenges for studies addressing the broad subject matter of revolutions and law. The first pertains to usages of these categories that endow them with agency and, in so doing, lose sight of their empirical content. The conflation of epistemic standpoints (normative and positive, objective and subjective) poses a second challenge. Statements that draw on the concept of legitimacy here are at the stand given how frequently they oscillate between these registers of analysis. A third challenge relates to the lack of specification of conditional factors. Statements about law,

revolutions, and cognate phenomena often wrap themselves in the mantle of unconditional claims without empirical qualifications to this effect.

5.1. Reifying Abstractions

Revolutions and law do not act. Actors do. Yet, formulations that hypostatize abstract concepts are quite frequent, and they lend themselves to causal interpretations. By the same token, these formulations reify abstractions as agents of some kinds. A statement such as “the revolution attempts to delegitimize the status quo and legitimate the new order” (Sultany 2017, p. xxxviii) suggests that law and revolution produce effects of their own. Incidentally, this language vests these abstractions with causal significance.

Reified usages tend to hollow out empirical contents. It becomes easier not to inquire into the empirical content of the categories we use when we already presume their causal significance. Conversely, our ability to hypostatize them is granted considerable leeway when we do not attempt to objectify their empirical content in a way that makes it traceable and specific. In short, reification gets along very well with the lack of empirical content. The longing is reciprocal. Arguments then risk invoking notions that not only obfuscate the heterogeneous character of the phenomenal realities to which they point but also shun off the requirements of empirical definitions: the specification of observable markers in light of which we can identify and delimit their referent (Ermakoff 2017, pp. 130–31).

5.2. Conflating Standpoints

Statements that draw on the notions of legitimacy and legitimation abound in the literature on revolutions and law, as the themes of legitimation problems, acts of foundation, and constituent power reviewed in Sections 3 and 4 underscore. These statements are actually emblematic of the ease with which arguments, often unbeknownst to their epistemological awareness, blend different epistemic registers: normative and positive as well as objective and subjective understandings (i.e., the standpoint of an external observer and the viewpoint of situated actors).

Undoubtedly, legitimacy is difficult to handle as an empirical concept (Ermakoff & Grdešić 2019, p. 580; Schoon 2022, p. 479). The term denotes a relational phenomenon: the way in which actors subjected to regulative claims relate to those who advance these claims. To simplify the exposition, let us assume an office holder (actor *O*) who according to the characteristics of her position is formally entitled to lay regulative claims on the behaviors of a group (actors *S*). Actor *O* is legitimate in the eyes of actors *S* if the latter believe that she has the right—she is entitled—to regulate their behaviors and to request their obedience. The phenomenon of legitimacy thus is coterminous with the beliefs that actors *S* hold. Actor *O*’s legitimacy is a reality that exists only as a derivation of these beliefs. Were actors *S* no longer to believe that *O* is entitled to request their obedience, she could no longer be considered legitimate in their eyes.

Understood empirically, the meaning of legitimacy is necessarily relative: It describes the beliefs and attitudes of a specific group exposed to requests for obedience (by an office holder) or to a regulatory setting (identified with an institution). Assessing the legitimacy of the office holder, or the institution, to whom a group relates requires assessing whether the members of this group grant the office holder or the institution the right to regulate their behavioral stance. Because probing the existence of such beliefs and attitudes requires extensive empirical work, a positive understanding of the phenomenon most often falls back on the indirect, and less conclusive, indicator provided by the subjects’ “consent” to be ruled (Applewhite 1978, p. 245; Arato 2017, p. 15; Linz 1978, pp. 16–17).

In any case, evoking the legitimacy of office holders without further qualification already opens the door to confusion, because such an expression makes legitimacy an attribute of office holders. Most statements invoking the notion cultivate this ambiguity as they implicitly equate “legitimate” with “morally acceptable” (Hyde 1983, p. 420). By the same token, they imperceptibly adopt the impersonal standpoint of morality and move the referent to the side of those who claim a right to rule. In so doing, they turn the empirical meaning on its head. Instead of considering how those subject to obedience requests relate to these requests and those who make them, a normative understanding considers the properties of the latter.

5.3. Unconditional Claims

“Law legitimates power” is the opening statement of Ackerman’s (2019, p. 1) book *Revolutionary Constitutions*. No strings are attached to it. The claim stands aloof in the ethereal realm of truths freed from the burdensome load of situated causalities and contingencies. It sounds at once evocative and plausible because it fits our commonsensical experience of power and law. Office holders and would-be office holders constantly shroud their claims to power in the language of law. They would not do so if they did not believe that this language contributed to eliciting the consent of those over whom they claim to exercise power. Quite revealingly, it is on this legitimizing effect that authoritarian contenders bet when they frame their power bids in legal terms, as discussed in Section 3.

The unconditional character of Ackerman’s statement, however, is problematic. There is no want of power claims asserted in legal terms that fail to elicit normative assent (Arato 2017, p. 18). Observers have questioned the empirical significance of the notion of legitimacy to describe how polity members accepted the power exercised by Communist party officials in Soviet-style regimes in Europe, however legal this power was (Maier 1997, pp. 50–53). Shifting the focus to a very different conjunctural and institutional context, consider the fate of President Morsi’s legal edicts in 2012. Mohamed Morsi was elected President of the Egyptian Republic on June 12, 2012. Soon after he assumed office (June 30, 2012), his office issued a Presidential Decree calling the legislature back into session (July 8) against the decision of the Supreme Constitutional Court. The July 8 decree generated considerable confusion and backfired (El-Ghobashy 2021, pp. 174–75).

Actually, pace Ackerman, law may not legitimize power. Its effects are conditional on collective processes involving different categories of actors. Empirical work done on legal revolutions and constitutional abdications shows, for instance, that the impact of legal claims enacting a shift of regime rests on processes of alignment geared to the prospect of collective acquiescence (Ermakoff 2008, chapters 8 and 9). Ackerman’s assertion therefore turns out to be either true by definition—the notion of law presumes its phenomenal validity, as defined in Section 2—or empirically incorrect because numerous instances invalidate its factual content. The problem lies in the unconditional status this assertion grants itself.

6. MODES OF ENGAGEMENT

The point about the mediating effects of collective processes can be generalized to the themes reviewed in Sections 3 and 4. Regime subversion, institutional consolidation, constitutional devolution, failures of legitimation, the crafting of revolutionary paradigms, acts of foundation, constitution making, and the differential refraction of legal norms in various domains of practice vary in scopes and outcomes depending on the collective dynamics emerging in these contexts. Tracing the processes underlying such dynamics requires documenting beliefs, motivations, expectations, interactions, and stances. Such foci make it more difficult to fall into the traps of

abstractions reified as causal agents, normative understandings that pose as analytical claims, and unconditional assertions.

When furthermore we investigate the themes reviewed above in light of actors' experiences as they unfold in the time of their interactions, the generic research question that comes to the fore is their modes of engagement with law under its various guises. How, for instance, do actors make claims, devise counterclaims, seek to justify their actions, strive to extend the scope of their demands, envision a regulative framework, negotiate constitutional provisions, and alter—at times dramatically—the normative principles regulating an institutional setting? For illustrative purposes, the following observations consider three of these modes: crafting claims, adapting repertoires, and redesigning norms.

6.1. Crafting

In March 1525, the representatives of several peasants' insurrectionary movements in South and West German states met in Memmingen, proclaimed the creation of a peasant confederation, and adopted a 12-article text asserting several rights and requests in accordance with divine law (article 12): the rural communes' right to choose their shepherd (article 1), community management of tithes (article 2), the abolition of serfdom (article 3) and the "Todfall" (servile death tax) (article 11), the reduction of *corvée* (article 6), the restitution of collective goods linked to natural resources (articles 4, 5, and 10), and greater equity concerning the distribution of means of subsistence (articles 7, 8 and 9) (Blickle 1975, pp. 22–24; Franz 1975, p. 101). For contemporary observers, the revolutionary character of this proclamation could not be in doubt (Blickle 1975, pp. 180–214; Oberman 1976, p. 118). Demands for the right to choose one's pastor and the call to abolish serfdom and tithing challenged local power structures and the decision-making privileges of lords and religious institutions.

German peasants rebelling against their lords in various localities in 1524 were not expecting their revolts to acquire the scope and political significance of a revolution (Blickle 1975, pp. 29, 45). Political demands beyond local sources of conflict and grievances emerged in the course of the mobilization process. These demands outlined an alternative legal order characterized by the end of master–serf relations and a transfer of rights to local rural communities. The engagement with law here is best described as an emergent feature of collective actions taking shape absent a plan or a definite model. The challengers craft edicts and proclamations in a revolutionary conjuncture that they bring about without having anticipated it.

6.2. Adapting

The improvised character of revolutionary action does not mean that preexisting legal and institutional features are of no consequence. Revolutionary challengers gauge political opportunities and vest them with revolutionary content by expanding on legal modes of action rehearsed or experienced in prerevolutionary times. This point can be spelled out in light of detailed studies that document contention emerging in the context of a relatively indeterminate power structure. Informative in this regard are monographs that highlight the modalities of peasants' demands for fields, woodlands, and water resources restitutions in revolutionary Mexico from 1915 on.

To recover lands and water resources appropriated by haciendas, strong men, or neighboring communes, village representatives and *pueblo* attorneys in Mexico called on the intervention of the judiciary throughout the nineteenth century. They brought claims and filed suits to courts at the district, state, and federal levels (Purnell 1999). When these claims led nowhere, they requested the executive to step in (Baitenmann 2020, p. 5). As the revolution erupted in 1910 and civil war dragged on, peasants occupied lands that had been usurped from them and engaged in

practices of self-management whenever the political conditions at the regional level would permit, while petitioning local revolutionary leaderships and newly agrarian commissions to resolve conflicts and formalize property rights (Baitenmann 2020, pp. 5–6; Brunk 1995).

6.3. Redesigning

Historical accounts invite us to consider two types of processes at play in the transition from one legal regime to another due to an episode of revolutionary contention. One takes the form of explicit moments of constitution making through deliberation, controversies, and proclamations. Revolutionaries debate, ponder upon, and opt for a regulatory framework. During these moments of exchange and decision making, a lot can happen (Elster 2000; Tackett 1996, chapter 5). Accounting for their outcomes requires inquiring into the dynamics of relationships within the groups that bring them about.

The Bolshevik leaders' adoption of an ethno-federal institutional setting in the 1920s exemplifies this point. At the Eighth Congress of the Bolshevik Party in March 1919, in the context of rising nationalist movements throughout Russia, Bolshevik leaders clashed on the question of the right of national self-determination. Lenin advocated the recognition of this right, arguing that it was politically required. Georgii Piatakov opposed it by emphasizing its political irrelevance (Smith 1999, pp. 7–28). The congress sided with Lenin. The issue was again debated at important party meetings in the following years. Finally, in 1923, two resolutions passed by the Twelfth Party congress in April and a Central Committee meeting in June formally endorsed an ethno-federal setup institutionalizing a right of national recognition (Martin 2001, pp. 9–10).

Less noticeable when it takes place, a second type of transformative process reflects shifts in configurations of strategic interests (Aoki 2014, p. 50) that in some instances allow stakeholders to redraw the normative principles undergirding a legal regime. The transformation of the regulatory framework of the Soviet ethno-federal structure in the 1930s is again a case in point. In the course of a forceful and violent grain requisition campaign, the Politburo issued two decrees on December 14–15, 1932, that in effect blamed the failures of the campaign in Ukraine on Ukrainian cadres suspected of having been contaminated by nationalist feelings. These decrees, adopted in the context of brutal repression, marked a fundamental shift in Soviet conceptions of how to treat nationalities, paving the way to policies of ethnic cleansing and a revision of the Soviet nationality constitution (Martin 2001, pp. 307–8; Solomon 1996, pp. 124–25).

7. CODA: THE PRODUCTION OF CONSENT

Empirical work on revolutionary conjunctures underscores their open-ended character and the threat they pose to legal regulations. At one end of the spectrum of possibilities, the very pretense of a legal order collapses. Civil war and anarchy prevail. Some, acting as warlords, carve for themselves ad hoc systems of rules. Law gets absorbed and diluted in violence. The litany of revolutionary events morphing into chaos and mayhem is a long one. At the other end of the spectrum of possible scenarios stands the reaffirmation of a system of formal rules with a regulative impact. The members of the polity agree to abide by a system of rules. Law regains its footing. Although these two polar scenarios are mutually exclusive at any point in time, they are not from a sequential standpoint.

This range of possible scenarios reminds us that law has no force of its own and that the institutionalization of a legal order can never be taken for granted. The regulative effectiveness of legal statutes and constitutional provisions is conditional on a process of endorsement assumed to be collective and large scale. The temporality is twofold. First, a new rule is devised. Will it take effect? The second moment is one of reception. If the rule is challenged from the moment

of its inception, it is in trouble. Effectiveness rests on the presumption of validity. As actors tacitly presume that this presumption is shared, they make the rule effective.

Subsumed to the question of impact is the question of consent. Regulative claims fail to produce their intended effects when they do not elicit the consent of those whose behaviors they claim to regulate. What remains to be explained is how groups come to acknowledge to office holders, or claimants to state power, the right to exercise a decisional capacity that affects their collective interests. Two points in this regard are worth emphasizing. First, consent is to be distinguished from mere compliance. It implies a degree of willful endorsement. Absent this endorsement, the notion of a belief in the legitimacy of office holders, their agents, or the regime they represent loses its empirical meaning. Second, there is no ground for assuming only one mode of production of consent. Acknowledging an office holder's right to rule may stem from a commitment to the normative principle undergirding the existence of this office. It may also result from a process of collective alignment whereby individuals endorse an office holder's claims to power because they believe, or expect, this endorsement to be shared.

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