

Islam Between Modernity and Coloniality; An International Legal History of Iran from the Late Qajar Period to Pahlavism

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Abstract

(English) From the time of colonization and imperialism, interactions between the lands and people informed by Islam and the Western world have remained tumultuous. With the recent uprisings in the Arab world, what we have seen from the West was an incapacity to consider Islam as a rational narrative basis for the establishment of a modern society. Indeed, from the repressive legal apparatuses and technologies of the “War on Terror” to the more ideological process of intervention and “democratic” state-building, there has been a contradiction in the language and actions of the West, especially with regards to international law. The fault line of this contradiction has oscillated between favouring the free expression of people, which often leaned towards Islam, and the ambivalent desire to not let Islam become a central political and normative pillar regulating societies of the Middle East.

Why would it be that the agency of particular actors informed by, but not reducible to Islam be left aside of the discourses and narratives of international law? This thesis will seek to demystify this question by focussing on the *epistemic privilege* of the West to *narrate* the *ontology* of an Other informed by Islam through international legal means. In this inquiry, I wish to understand how international law, through its biases, modes of operation and technologies, is able to deny knowledges and formulations of Being specific to the non-Western Other. In order to do this, my investigation will look at this question through the interactions of Persia (and its successor, Iran), as an actor informed (although again, not reducible to) Islam, and the West in 19th and early 20th century international law. This interrogation is, I think, central to our present due to the importance of the Middle East and Islam in the global setting and the rising power of states informed by Islam such as Iran, Indonesia and Malaysia, amongst others.

(Français) Depuis le temps de la colonisation et de l’impérialisme, les interactions entre les terres et peuples influencés par l’Islam et le monde occidental sont demeurées tumultueuses. Avec les récents soulèvements populaires qualifiés de « Printemps arabe », nous avons pu observer de la part de la société internationale une incapacité à concevoir l’Islam comme fondement narratif pour l’établissement de sociétés modernes. En effet, de l’usage d’appareils et technologies légales répressives tels que la « Guerre contre le terrorisme », jusqu’aux variantes idéologiques du processus d’intervention et de « state-building » démocratique, on remarque une contradiction immanente dans l’usage du langage du droit international par les États occidentaux. La ligne de fracture de cette contradiction oscille entre le support pour la liberté d’expression des peuples, qui a dans plusieurs cas mené à une variante politique de l’Islam, et le désir ambivalent de ne pas laisser l’Islam devenir un fondement politico-normatif des sociétés du Moyen-Orient.

Pourquoi alors, dans le système libéral la capacité de représentation politique et normative d’acteurs particuliers influencés par l’Islam serait laissée hors des discours et narrations du droit international? Ce mémoire de recherche vise à démystifier cette question en portant l’attention sur ce que j’appelle le *privilege épistémique* de l’Occident, permettant de faire la *narration* de l’ontologie de l’Autre à travers des moyens légaux fournis par le droit international. Je proposerai une analyse de cette question à travers les interactions légales ayant marqué l’Occident et le monde informé par l’Islam, ici centré sur la Perse et son successeur, l’Iran, dans le droit international du 19^{ième} et du début du 20^{ième} siècle. Cette interrogation, je crois, est centrale pour le monde contemporain vu la centralité du Moyen-Orient et de l’Islam dans les affaires mondiales et la montée en puissance d’États musulmans, notamment l’Iran, l’Indonésie et la Malaisie.

On the Power to Narrate; an Introduction

“Our ideas of ‘East’ and ‘West’ have never been free of myth and fantasy, and even to this day they are not primarily ideas about place and geography.”

- Stuart Hall, *The West and the Rest*¹

On May 19th 2011, President Obama voiced the United States’ position with regards to the recent events of what would be soon thereafter referred to as the “Arab Spring”.² In his address, the U.S. president defends the dignity of individuals rising up throughout the Middle East to “demand their basic human rights”, forcing the ruling autocratic regimes to step aside. Arguably, however, the address appears to deal centrally with U.S. interests in the events that shook up most of the Middle-East. Obama makes clear from the outset that U.S. interests in the region, notwithstanding their substance, represent universal principles that are in the interest of all states and are thus by no means “hostile to [the Arab and Muslim] people’s hopes”³. The president offers guidance as to the principles that should inform the revolts in the Middle-East in the form of a set of universal values required in a democratic society of states; 1. the stability of nations and the rejection of violence and aggression, 2. respect of a basic set of human rights, and 3. a general support for political and economic reform to meet the aspirations of the people. Those principles in fact replicate the general guidelines of the post-WWII liberal internationalist order⁴ established by the United Nations (UN) institutions, the aims of which revolve around the promotion of an international democratic order, human rights and free trade⁵. International law has been central to this order in trying to, and arguably succeeding to establish the primacy of law

¹ Stuart Hall, “The West and the Rest: Discourse and Power” in Stuart Hall & Bram Gieben, eds, *Formations of Modernity* (Cambridge: Polity Press, 1992) 275 at 185.

² Barack Obama, “Remarks by the President on the Middle East and North Africa”, (19 May 2011), online: whitehouse.gov <<https://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa>>.

³ *Ibid.*

⁴ I understand this concept, as provided by Anne-Marie Slaughter, as a paradigmatic view of the state system that mandates a distinction between different types of states, based on their domestic political structure and ideology, thus favouring a specific type of organization, that of the liberal democratic state. For more on this see; Anne-Marie Slaughter, “International law in a World of Liberal States” (1995) 6:1 *European Journal of International Law* 503 at 504–505.

⁵ Stanley Hoffmann, “The Crisis of Liberal Internationalism” (1995) 98 *Foreign Policy* 159.

over politics, while at the same time reproducing the paradoxes and ambivalences of the liberal theory of international relations.⁶

Interestingly however, opposed to the stated recognition of the democratic personal agency of local populations, no pronouncement is made as to the collective agency of those people living in the “postcolonial” societies of the Middle East. While these populations have long sought to realize their right to political and economic self-determination, that is, their independence from foreign interests and capacity to freely express their political and economic will, as Obama himself acknowledges, those processes were to no avail⁷. Postcolonial realities in the Middle East have remained in most cases failed attempts to fulfil the promises of liberal international law. On this delayed action of the principles of self-determination, Obama hints at its genealogy in local causes, leaving aside the possibility of foreign interference; oligarchic nepotism, a succession of barbarous dictatorships and a serious lack of freedom are to blame. The Islamicate world⁸, this grouping of states and polities informed by Islam but not reducible to it, is then to blame for its own deficiencies.

In highlighting local causes as the reasons for the Islamicate world’s tragedy, Obama specifically creates this world as problematic, and proposes, in response, the universal principles of liberal internationalism. This narrative appears to create a set of perceived spaces, created through images, texts and discourses, which in this case have the capacity to mark other people, here those in the Islamicate world, as irredeemably different (barbaric, undemocratic, warmongering, etc.), and thus to sanction the employment of the right means to change this otherness⁹. There appears to be a *power to narrate* existent in the structure of the international sphere; a hegemonic consensus that stresses that the European, the modern, or liberal, in

⁶ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005); Martti Koskenniemi, *The Politics of International law* (Oxford: Hart, 2011) at 35–62.

⁷ Obama, *supra* note 2.

⁸ Hodgson proposed the usage of the concept of the “Islamicate” to refer to social phenomena that are informed by Islam but are not reducible to it. The Islamicate world as we shall see below will be the central subject of inquiry of this research. See Marshall G S Hodgson, *The Venture of Islam: Conscience and History in a World Civilization* (Chicago: University of Chicago Press, 1974) at 58.

⁹ Derek Gregory, *The Colonial Present: Afghanistan, Palestine, and Iraq* (Malden, MA: Blackwell Pub., 2004) at 16. See also Edward W Said, *Orientalism* (New York: Vintage Books, 1994) at 49–73; Walter Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality, and Colonization* (Ann Arbor: University of Michigan Press, 1995).

comparison to its binary opposite, defines this Other's fate and nature through its epistemic supremacy, and forecloses the agency of the other binary pole.¹⁰

In this scheme, of which President Obama's rhetoric is merely indicative of a broader Western privilege, the Islamic world is the "Otherized"; "an exception to the global security order, to modernity, to secularism, to forms of knowledge and reason that constitute the "we" talking about all these very exceptions."¹¹ . In that sense movements and collectives informed by political Islam, comprising groups as different as Jabhat al-Nusra or the Palestinian Islamic Jihad, and state actors such as the Ennahdha's Tunisia, the Egypt of President Morsi's Muslim Brotherhood or Muammar Qaddafi's Libya, were grouped together in the "Other" pole of the binary, and placed in the position of having to speak the language favoured by the West or suffer the consequences. This entailed speaking the language of democracy and human rights, the elision of Islam from public life. Otherwise, actors that refused the imperatives of liberal internationalism would be recast in the modern/traditional binary, with the effect of sanctioning resort to exemplary violence, as was arguably the case with Qaddafi and Morsi. Muslim agency is then denied or recognized only when measured in reference to premises fixed by the West¹², and can only be given effect through accepted international institutions or the policy choices¹³ of the liberal international order.

The field of international law, as an extension of this liberal internationalist order, is not sheltered from the effects of this power to narrate. From the colonialist structures of the past¹⁴ to the exceptionalist measures of the War on Terror, humanitarian interventions and the ambiguous

¹⁰ Said, *supra* note 9 at 7.

¹¹ Waleed Hazbun, "The Geopolitics of Knowledge and the Challenge of Postcolonial Agency: International Relations, US Policy and the Arab World" in *The Oxford Handbook of Postcolonial Studies*, Graham Huggan ed (Oxford: Oxford University Press, 2013) p.217 at 218. See also; Mustapha Kamal Pasha, "Human Security and Exceptionalism(s): Securitization, Neo-liberalism and Islam" in Giorgio Shani, Makoto Sato & Mustapha Kamal Pasha, eds, *Protecting Human Security in a Post 9/11 World* (Palgrave Macmillan UK, 2007) 177; Waleed Hazbun, "The Middle East through the Lens of Critical Geopolitics: Globalization, Terrorism and the Iraq War" in Michael E Bonine, Abbas Amanat & Michael Ezekiel Gasper, eds, *Is there a Middle East?: the evolution of a geopolitical concept* (Stanford: Stanford University Press, 2012) 207.

¹² Hazbun, *supra* note 11 at 218.

¹³ Tarak Barkawai & Mark Laffey, "The Postcolonial Moment in Security Studies" (2006) 32:02 Rev Int Stud 329 at 350.

¹⁴ Antony Anghie, *Imperialism, Sovereignty, and the Making of International law* (Cambridge: Cambridge University Press, 2005).

status of Guantanamo Bay¹⁵, narration has been a rampant practice of the discipline through processes of “otherizing” of those outside of the Eurocentric epistemic realm. The doctrines of international law, such as those of *terra nullius*, the civilising mission, protectorates, mandates and trusts, have provided substantial justifications to create a binary divide between the civilized nations and the backward territories, the state and the non-state, the modern and the traditional. Fulfilment of the rights to self-determination and self-government, which would allow an actor to pass from one side of the divide to the other and to attain a certain degree of political agency would then be conditional to the actor’s “legitimacy” following the principles and doctrines of liberal international law. Those on the wrong side of the divide will then neither have the opportunity of actual legal legitimacy, nor that of political agency. The enforcement of this divide would allow the states of the liberal internationalist order to reproduce their biases and ambivalences about this order, and thus to create imaginaries *about* the Other by narrating the differences between the legal and the illegal. This leads to the possibility that, in the Islamicate world, states that constitute the liberal order can choose “to suppress, or very selectively to deploy [...] international law as [a] mechanism for governing [their] own behaviour and that of other states in the region.”¹⁶ Obama and former Secretary of State Clinton¹⁷ candidly insinuated this last point when they suggested that “fundamentally, there is a right side of history”¹⁸.

However, what of the Other’s side of history, notably as it expresses itself in alternative international legalities? An engagement with this other side could offer opportunities in comprehending this perplexing power to narrate. Leela Ghandi has proposed that counter-narrativization is in fact a form of resistance “to the mystifying amnesia of the colonial aftermath”, seeking to demystify and interrogate the colonial past to make sense of the present.¹⁹ Situating enquiry in this other side of history has proven, in the field of international law, to be a fruitful endeavour in unearthing the narratives that have been suppressed from history and to

¹⁵ Amongst others, Stephen Morton, “Violence, Law, and Justice in the Colonial Present” in Graham Huggan, ed, *The Oxford Handbook of Postcolonial Studies* (Oxford University Press, 2013) 179 at 179; Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

¹⁶ Hazbun, *supra* note 11 at 229.

¹⁷ Barack Obama, “Press Conference by the President”, (15 February 2011), online: *whitehouse.gov* <<https://www.whitehouse.gov/the-press-office/2011/02/15/press-conference-president>>.

¹⁸ Hillary Clinton, “Keynote Address at the National Democratic Institute’s 2011 Democracy Awards Dinner”, (7 November 2011), online: *US Department of State* <<http://www.state.gov/secretary/20092013clinton/rm/2011/11/176750.htm>>.

¹⁹ Leela Gandhi, *Postcolonial Theory a Critical Introduction* (Edinburgh: Edinburgh University Press, 1998) at 64.

broaden the field of international legal inquiries beyond Eurocentric accounts²⁰, to challenge and destabilize the dominant hegemonic narratives²¹. A few very interesting accounts of this history have recently sought to revive the agency of “semi-peripheral” legal actors in the establishment of the rules of international law²². 20th century international law was not simply the work of a hegemonic West, or of a set of “core” states, but rather that of the clash between the actors of the semi-periphery and the core, a fact that remains largely elided from the generally accepted historiography of the discipline.²³ Consequently, writing in the different but arguably similar context of the role of international law in North/South relations, Diane Otto has recalled that “a largely uncontested silence surrounds the implications of expanding democratization for international law-making processes”²⁴, pointing to the biases of the largely Eurocentric epistemic roots of the discipline.

Interestingly, postcolonial theory’s engagements with international law have mostly left the question of the Islamicate world aside and even more so with regards to the agency of those affiliated with resurgent political Islam. After inquiries into the discipline such as Koskennimi’s have demonstrated its permeability to politics and ideology, this elision raises interesting questions as to the biases and preferences, whether intentional or not, of international law. Outside the regular orientalist reification of Islamic law as an object of study for internationalists, there appears to be a substantial gap in the theorization of international law and its engagement with the events and experiences informed by Islam. However, between the dissolution of the Ottoman Empire after the First World War, the establishment of mandates over the territories of a large part of the Middle East, the presence of most of the “decolonized” Islamicate world at the

²⁰ An interesting account of this is J.Thuo Gathii’s discussion of the facts of legal polycentricity and the colonial divide in James Thuo Gathii, “International law and Eurocentricity” (1998) 9:1 Eur J Int Law 184.

²¹ Amongst others; Christopher Weeramantry & Nathaniel Berman, “The Grotius Lecture Series” (1999) 14:6 Am U Int’l Law Rev 1515; Antony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International law” (1999) 40:1 Harv Int’l LJ 1.

²² Notably: Arnulf Becker Lorca, *Mestizo International law: A Global Intellectual History 1842-1933* (Cambridge: Cambridge University Press, 2014); Umut Özsu, “The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory” in Florian Hoffman & Anne Orford, eds, *The Oxford Handbook of the Theory of International law* (Oxford: Oxford University Press, 2016); Thomas Skouteris & Umut Özsu, “International Legal Histories of the Ottoman Empire: An Introduction to the Symposium” (2016) 18:1 Journal of the History of International law 1. See also ; James Cockayne, “Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations” (2002) 84:847 Rev Int Croix-Rouge 597.

²³ Becker Lorca, *supra* note 22.

²⁴ Diane Otto, “Subalternity and International law: The Problems of Global Community and the incommensurability of Difference” in Eve Darian-Smith & Peter Fitzpatrick, eds, *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999) 145.

United Nations in the first decades that followed its creation and the subsequent stress posed by the resurgence of movements informed by political Islam, there have been substantial intersections in the discipline with those experiences. In that sense, one of the most unexpected events of the 20th century, central to the rationale of the Third World and the moment of decolonization, the Iranian revolution, has been largely ignored in the mainstream narratives of international law²⁵, except for post-revolutionary Iran's human rights record, which has been widely investigated but from a perspective that merely takes the liberal international narrative for granted²⁶. This short discussion thus culminates in a few interrogations; Why is it that the agency of some particular actors and events, the Islamicate world and more specifically resurgent political Islam, have been left aside of the discourses and narratives of International law? What is the relationship between this elision and the abovementioned epistemic *power to narrate*? And more specifically, how does this interrogation relate to hegemonic forms of power and discourse, such as the colonial matrix of power, or the dominant narration of the international law found in liberalism?

This thesis will seek to demystify those questions and to provide a method to account for the interaction between Islam and the Eurocentric frame of international law. I submit that there is substantial space left in legal academia to engage with this inquiry. I would also propose that such an endeavour is of fundamental importance with regards to the contemporary significance of the Middle East in the global setting and the rising power of Islamicate states such as Iran, Indonesia and Malaysia, amongst others. Such research also has significant potential in understanding the fundamental ambivalences of liberal internationalism, and the power to narrate

²⁵ A notable exception is Sarvenaz Bahar, "Khomeinism, the Islamic Republic of Iran, and International law: The Relevance of Islamic Political Ideology" (1992) 33:1 Harv Int'l LJ 145. There were a few other engagements with revolutionary Iran and international law in the context of the 1980-1988 war with Iraq, while surprisingly little attention has been paid to the war in international law. See amongst others; I F Dekker et al, eds, *The Gulf War of 1980-1988: the Iran-Iraq War in international legal perspective* (Dordrecht: Martinus Nijhoff Publishers, 1992); Erik B Wang, "Iran-Iraq War Revisited: Some Reflections on the Role of International law, The" (1994) 32 Can YB Int'l L 83.

²⁶ A subject that is quite exemplary in showing the attempts at narrating the other. See amongst others; Reza Afshari, *Human Rights in Iran: The Abuse of Cultural Relativism* (Philadelphia: University of Pennsylvania Press, 2001); Hassan Davoodifard & Jayum Anak Jawan, "Change of Human Rights Perspective in Iran" (2011) 2:7 International Journal of Business and Social Science 126; Afshin Matin-Asgari, "Twentieth Century Iran's Political Prisoners" (2006) 42:5 Middle Eastern Studies 689; Uichol Kim, Henriette Sinding Aasen & Shirin 'Ibadi, *Democracy, human rights, and Islam in modern Iran: psychological, social, and cultural perspectives* (Bergen: Fagbokforlaget, 2003); Thomas Schirrmacher, "Iran : suppression of religious freedom and persecution of religious minorities : case studies" (2009) 2:1 International Journal of Religious Freedom 111.

in international law.²⁷ More specifically on the power to narrate, and following the above discussion, this inquiry could also shed some light on the epistemic preferences of the liberal international order, particularly on the question of religion²⁸. Finally, what my perspective will seek to prove is that there are other epistemic and ontological models that are straining and shaping international law, and that, while they are not necessarily illiberal, those models are under the narrating and negating power of the hegemonic narratives of liberal internationalism. My goal, then, is to see how international law, through its biases, modes of operation and technologies is able to deny knowledges (epistemologies) and other formulations of Being (or an ontology as an elucidation of what it means to “be there”, to exist, the possibility of a projected future²⁹) by forgetting the Other’s Being, and refusing the coevalness of ontological differences.

In order to do this, my investigation will look at the question of the epistemic power to narrate through the interaction between 19th and 20th century international law and Persia, and the nascent state of Iran, as an actor largely informed by Islam, and a possible future marked by Islam. What I propose, therefore, is a genealogical inquiry into Iran’s reception and articulation of the norms of international law, from the end of the 19th century to the early Pahlavi era of the 1920s and 1930s. To be fair, what I wish to do with this work is to set the genealogical groundwork for further work on the question of the relationship between international law and political Islam, as a normative ordering of the world that challenges liberal internationalism. This endeavour is then part of my broader research project, which seeks to flesh out the interaction between international law and ontologies influenced and informed by (but not reducible to) religion. This project, however, goes beyond the purpose of this Master’s thesis.³⁰

²⁷ While he does not, strictly speaking, engage with International law, Santos offers a very interesting account of the logic of epistemicide; Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder: Paradigm Publishers, 2013).

²⁸ On this issue, Nathaniel Berman has recently initiated a research project on religion and internationalism that bears great potential. On this see; Nathaniel Berman, “‘The Sacred Conspiracy’: Religion, Nationalism, and the Crisis of Internationalism” (2012) 25:01 *Leiden J Int’l L* 9.

²⁹ Nelson Maldonado-Torres, “On the Coloniality of Being” (2007) 21:2-3 *Cultural Studies* 240 at 249–251; Martin Heidegger, *Being and Time*, translated by John Macquarrie & Edward Robinson (New York: Harper Collins, 1962) at 28–35.

³⁰ Pierre-Alexandre Cardinal, “Resistance and International law; De-coloniality and Pluritopic Hermeneutics” (2016) 1:1 *Inter Gentes: McGill Journal of International law & Legal Pluralism*; Frédéric Mégret & Pierre-Alexandre Cardinal, “The Other ‘Other’; Moors, International law and the Origin of the Colonial Matrix” in Ignacio de la Rasilla del Moral & Ayesha Shahid, eds, *New Approaches to the History of International law and Islam* (Leiden: Martinus Nijhoff/Brill, 2017) (Forthcoming); Pierre-Alexandre Cardinal, “Ontologicidal violence; Modernity-Coloniality and the Muslim Subject in International law” in Marc Woons & Sebastian Weier, eds, *Borders*,

The argument I propose here will unfold in two sections. First, I will anchor my theoretical framework in a discussion that focuses the relation between international law and the Eurocentric project of Modernity/Coloniality, and how the latter translates in the former. My claim will be that the discipline of international law, while it appears to be premised on a set of consensual and thus positive epistemic and ontological premises (such as the primacy of the nation state and secularism), is, I would rather claim, under the effect of a matrix of power that enforces the epistemic and ontological preferences of Europe. In a sense then, the *Nomos der Erde*, international law, represents the universalization of the European experience down to the smallest details of its epistemological criteria and of its ontological claims.

Then, in a second section, I will explore how my intuition about the matrix of power of the project of Western modernity translates into the relationship between Persia and the West up to the decade after the creation of the independent nation of Iran. My claim will be that international law conveyed a form of Legal Orientalism through its modes of operation and technologies. This legal form of Said's Orientalism, I argue, postulates the preconceived ideas and imagined geographies that instituted the Orient as a zone of exception as the foundations of the discipline of international law. Persia, while it maintained a substantial balance of power, and a relative freedom from the direct interference in local affairs brought by direct colonialism, was then subtracted from the application of the general rules of the discipline, until it could "remediate" its oriental character. On this last note, I will argue that this underlying orientalist narrative hid from sight that international law was premised on the Eurocentric project of modernity/coloniality. In that sense, I argue that the "semi-peripheral legal consciousness" that was proposed by Arnulf Becker-Lorca in his recent book³¹, while being a means of resistance, was also an internalization of the project of modernity/coloniality. Striding on the newly cleared path of sovereign autonomy that illuminated the interwar years, Persia and later Iran, in a semi-

Borderthinking, Borderlands: Developing a Critical Epistemology of Global Politics (Bristol: E-International Relations Publishing, 2017) (Forthcoming); Pierre-Alexandre Cardinal, "Imperialism, International law and Development; Pahlavism and Iran's Quest for Modernity" (2017) Special Issue Canadian Journal of Development Studies. (Forthcoming)

³¹ Becker Lorca, *supra* note 22.

peripheral and Third-Worldist perspective³², sought to establish itself as a modern nation state, by following the radical utopian position provided by the existent rules of international law. In doing so however, my final claim will be that Iran merely lent itself to the constrained consensus on the *politics* of international law, a set of argumentative and normative structures established under the foundational *political* violence of the project of modernity/coloniality. While the ensuing interplay between Iran and the West would be of significant interest, especially in the years leading up to the Islamic Revolution, the constraints of this project will not allow for further inquiry.

As to the reason why I chose to specifically investigate the situation of Iran, it stems from the broader interest I have in exploring the meaning of the Islamic Revolution, and more widely of “dissenting ontologies” for the discipline. While I cannot verify this claim in the pages of this thesis, the Islamic Revolution features a frame of theory and action that can give us hints as to how to understand the meaning of political Islam, as an ontology, in relation to the normative international order. Evidently, this question is of fundamental importance in our times. However, an exploration of the Islamic Revolution requires an in-depth study of its genealogy, which is what this thesis seeks to propose. This is why this work seeks to analyze Persia/Iran’s very ambivalent position with regards to international law. The position that Iran has had in the world-system for the last century will also allow for the development of a broader understanding of international law’s effects in the “semi-periphery”, this world that was neither part of the core of “civilized nations”, nor a direct colonial dependency. While authors such as Ozsu and Becker Lorca have started to explore this question, much remains to be studied, especially with regard to the meaning of a “semi-peripheral legal consciousness”.³³ Also, as I proposed above, there is a need in the discipline for a broader engagement with Islam. This thesis asks why, in the Islamicate world, Islam as a legal narrative was elided from public discourses of state building

³² These objectives are articulated around the principles of the promotion of equality, sovereign power, prohibition of intervention and a certain sovereign democratic ideal, much as was the case in Becker-Lorca’s engagement with pre-war semi-peripheral legal consciousness. On the Bandung conference, see Mohamed Bennouna, “Bandung Conference (1955)”, (2007), online: *Oxford Public International law website* <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e901>>.

³³ Becker Lorca, *supra* note 22; Umut Özsu, “From the ‘Semi-Civilized State’ to the ‘Emerging Market’: Remarks on the International Legal History of the Semi-Periphery” in Ugo Mattei & John D Haskell, eds, *Research Handbook on Political Economy and Law* (Cheltenham: Edward Elgar Publishing, 2015) 246; Özsu, *supra* note 22.

during the later years of European imperialism, for example, the creation of the states of Pahlavi Iran, and of the Kemalist Republic of Turkey.

One last point I would like to clarify before moving on to the core of the essay is an indication of my positionality³⁴. Indeed, the first step of critical theory should be self-reflexivity, and an awareness as to the author's social, cultural and political situation. The position from which I speak is that of a non-Muslim who has not lived in the Islamicate world and who has a very basic knowledge of the languages of Islam. With regards to language, I will refer to concepts that are in languages that I do not speak fluently, but which I have endeavoured to understand through reading and personal inquiries. I am sure that this conceptual apparatus will resonate with others more familiar than I am with the said languages. However, while this can be seen as a drawback to the actual strength or legitimacy of my argument, I wish to stress that my main field of inquiry remains that of international law, one which I am more intimate with, and that while I do engage with Islamic sources, I made a point to study a large corpus of Islamic liberation theology and other Islamic literature available in English. The audience to which this essay is directed will mostly be English-speaking legal scholars, and thus, due to the very rigid disciplinary boundaries of the legal field, reference to English literature in this case is to my mind very important for the actual traceability of the sources and arguments.

In that sense, I wish to make clear that, not being a scholar of Islamic theology and jurisprudence primarily, my reading of Islam is highly dependent on the interpretations of others. Consequently, this inquiry will not be one into *shari'ah* or *fiqh*. In fact, for the purpose of this thesis, what interests me in Islam is its position as an “outsider” to the realm of international law (both as outside its language and as an alternative legal and epistemic framework)³⁵, and I seek to use this position for the critical purpose of my inquiry. My proposition then is neither to define one interpretation of Islam as “true” or “truer” than any other, nor do I believe that such debates are useful in general. From my understanding, there is only one Islam, based on a hierarchy of sources that are immutable and from which Islamic teachings stem, from which adherents can

³⁴ Rémi Bachand, “Les apports de la théorie féministe du positionnement dans une théorie (critique) du droit (international)” in Georges Azzaria, ed, *Les cadres théoriques et le droit: actes de la 2e Journée d'étude sur la méthodologie et l'épistémologie juridiques* (Cowansville: Éditions Yvon Blais, 2013).

³⁵ Andrew F March & Naz K Modirzadeh, “Ambivalent Universalism? Jus ad Bellum in Modern Islamic Legal Discourse” (2013) 24:1 *European Journal Of International law* 367 at 388.

choose following their preferences. This means that followers can have diverse interpretations of Islam, but always return to the sources of their beliefs since, after all, Islam is the recognition that there is one God, and that Muhammad is his Prophet. It is neither in my capacity or interest, nor my place to be questioning this. Finally, my position is also that of one well acquainted with critical theory, and quite aware of his privilege. The objective, in that sense, will be to use this privilege in an act of epistemic disobedience³⁶ in order to give voice to those whose voice has been obscured by dominant narratives, and to disconnect the discourse of international law from its mainly Eurocentric origin. This project however, as I hope you will understand, reaches farther than what is possible in the pages of this thesis.

³⁶ On this concept, see amongst others; Walter D. Mignolo, "Epistemic Disobedience and the Decolonial Option: A Manifesto" (2011) 1:2 *Transmodernity: J of Peripheral Cult Prod* 44; Boaventura de Sousa Santos, *Cognitive Justice in a Global World: Prudent Knowledges for a Decent Life* (Lexington Books, 2007); Santos, *supra* note 27; José-Manuel Barreto, "Epistemologies of the South and Human Rights: Santos and the Quest for Global and Cognitive Justice" (2014) 21:2 *Indiana Journal of Global Legal Studies* 395.

Chapter 1 – International law, Coloniality and the Political

“The vanquished always want to imitate the victor in his distinctive characteristics, his dress, his occupation, and all his other conditions and custom. [...] [He] considers him perfect, either because it is impressed by the respect it has for him, or because it erroneously assumes that its own subservience to him is not due to the nature of defeat but to the perfection of the victor.”

- Ibn Khaldun, *Muqaddimat*³⁷

Ibn Khaldun, the famous 14th century Ifriqiyan Muslim historiographer, sociologist and historian, hypothesised that the vanquished, the oppressed, facing the triumph of a victor, often reverts to imitation of this victor, certain of its “perfection”. The vanquished seeks to assimilate its own self to that of the victor to attain the same level of perfection, under the certainty that the defeat suffered was entirely tributary of the failures of its own customs and manners. The victor would then theoretically imprint the superiority of its way of being, its way of making sense of the world, on the vanquished, through an act of violence, of submission. This act of violence could then serve as the basis for an epistemic domination. What is meant by this is that a defeat for the vanquished, whether attributable to respect or the appearance of perfection of the victor, leads the former to seek the perfection of this victor through imitation. This requires that the vanquished leave aside its ways to welcome those of the conqueror. The dominant party, willingly or not, then organizes the life of the vanquished. In the preceding introductory discussion, I have proposed, drawing from Edward Said’s *Orientalism*, that international law might give effect to an epistemic supremacy, a power to “narrate” the Other.³⁸ The discourse of *Orientalism*, iterated at the zenith of European imperialism, allowed a dominant West to “invent” a radically non-industrialized and culturally different Orient as a geographic and cultural space of exception, as an irremediable “Other”. This iteration of a backwards and distinctive Orient was thus constitutive of its “Western” identity; what the Orient was, the West was not, and vice-versa. In that sense, it is while witnessing the social economic and military prowess of Europe that Sultan Selim III, one of the first reformist Ottoman Sultan, perceived that success followed from the punctual imitation of its practices and ways of life.

³⁷ Ibn Khaldūn, *The Muqaddimah: An Introduction to History*, Franz Rosenthal & N. J. Dawood, eds. (Princeton: Princeton University Press, 1969) at 116.

³⁸ I have also discussed this “epistemic privilege” at greater lengths in; Cardinal, *supra* note 30.

The cultural and geographical variations between the two poles of the equation (the West and the Other) then created self-defining distances and differences that were to be erased through the actions of the dominant pole, but also through a discourse of retroactive epistemic supremacy that sets the vanquished as “historically backwards”.³⁹ In other words, the discourse of Orientalism and the colonial practices of the West are two sides of the same coin. This discourse was certainly central to the legitimization of the venture of European colonization. The multiple stages of the colonial rhetoric (For example, ideas of “salvation”, “progress”, “development”, “modernization”, “democracy”, “secularization”, etc.) sought to establish the triumph of the European, the Western, over its irremediable Other. The vanquished side, the oppressed was to be dominated, certainly physically, but also epistemically in believing its own backwardness and the necessity to adopt the victor’s model. Orientalism, and its necessary epistemic preference, Eurocentrism, are then not questions of mere colonial geography, but also, centrally of mythified epistemic power.⁴⁰

This section will seek to flesh out a theoretical structure from which to understand the meddling of this dominant epistemic power with the international legal system. The idea is to provide a theoretical background that would allow me to understand how subjective understandings of European supremacy attained a hegemonic status within the avowedly objective normative schemes of international law. The question is then how, theoretically, was a particular epistemic model elevated to an avowed universality. My hypothesis is that the question of the *political*, which I shall discuss in a first section, is inherently tied to the project of modernity and its translation in international law, the subject of the second section. In other words, my hypothesis is that there is a clear narration of the colonial discourse of modernity in international law, a discourse that is the product of specific authoritative texts and institutions generated by lawyers and political actors directly involved in or in support of the Western expansionist project⁴¹. I claim that the discourse of those actors derives from the broader project

³⁹ Robert Young, *White Mythologies: Writing History and the West* (London: Routledge, 1990) at 2–5.

⁴⁰ On this see; Anibal Quijano, “Globalizacion, colonialidad y democracia” in Instituto de Altos Estudios Diplomaticos Pedro Gual, ed, *Tendencias basicas de nuestra epoca: Globalizacion y Democracia*, Instituto de Altos Estudios Diplomaticos Pedro Gual ed (Caracas, 2001) 25; Anibal Quijano, “Coloniality of Power and Eurocentrism in Latin America” (2000) 15:2 *International Sociology* 215.

⁴¹ Talal Asad, “Anthropology and the Analysis of Ideology” (1979) 14:4 *Man* 607.

of modernity that, while being foundational to international law, makes it fundamentally unstable. This instability comes from the disjunction between the claim to epistemic universality of the normative order through modern rationalism, destabilized by its actual particular biased Eurocentric foundations.

A. On Politics and the Political

One of the central defining features of modernity has been the establishment of a particular form of knowledge as a “scientific” epistemology based on a method that theoretically shelters it from subjective biases, allowing only deduction from objective facts. The Hobbesian canon of the modern theorization of the science of politics, concerned with understanding human behaviour, separated the realm of what is “political” from the realm of the law, which was to be deployed by a deductive process of rule-making established by the scientific analysis of history, sociology and anthropology.⁴² Modernity then clearly delimits both spheres of the political and the law as mutually exclusive, enforcing a strict distinction between the two in order to maintain scientific objectivity. Law-making was then objectively grounded on facts, and reducible scientifically to, early on, natural law theories, and later “the last irreducible atom of social life: the voter”.⁴³ However, the possibility of an objective scientific knowledge and the hermetic separation between social sciences, especially in the realms of politics and law, has been breached open by many. In international law, this was the case, with Marti Koskenniemi who argued that international normativity was merely an argumentative practice that reflected the preferences of its actors.⁴⁴ This sub-section will seek to provide a discussion on the issue of the foundations of “politics” and the “political” in the modern era of liberalism (which I situate as originating in the thoughts of, amongst others Locke and Montesquieu in the 17th and 18th centuries), and by extension liberal internationalism and international law.

Chantal Mouffe has differentiated between a “political science” dealing with the realm of politics, the level of the “ontic”, and that of “political theory”, which deals with the “essence of

⁴² Anthony Pagden, *The Languages of Political Theory in Early-Modern Europe* (Cambridge: Cambridge University Press, 1987) at 14–17.

⁴³ Bacon, quoted in *Ibid* at 16.

⁴⁴ Koskenniemi, *supra* note 6; Koskenniemi, *supra* note 6.

the political”, the level of the “ontological”.⁴⁵ She defines the former as referring to the study of the practices of conventional politics, premised on an accepted political convention, while the latter, the political, deals with “the very way in which society is instituted”⁴⁶, the foundational principles of a polity, a space of power, conflict and antagonism. The political, through the constructive antagonisms at the root of a society, circumvents the accepted practices and institutions of the realm of politics, which organize coexistence in the context of this conflictuality. However, Mouffe claims that because of the hegemony of liberalism and rationalism in thinking about politics, we are incapable of understanding the ontological dimension of the political, which prevents us from actually thinking this political, its meaning.⁴⁷ In his seminal *The Concept of the Political*⁴⁸, Carl Schmitt, pointing at one of the fundamental ambivalences of liberal theory, put forward the claim that liberalism could not give birth to a specifically “political” conception of a society. According to him, rational individualism, on which liberalism is premised, must negate the possibility of the political since it requires that the individual remains the ultimate point of reference, against collectives that constitute the political. He then proposes that liberalism systematically evades the possibility of an overarching authority, set of rules or common sense (politics), “the critical distrust [that] is easily explained by the principles of a system whereby the individual must remain terminus a quo and terminus ad quem”⁴⁹.

Following Schmitt, there is therefore no place in liberalism for the establishment of antagonistic political collectives set in a friend/enemy divide, as the paradigm seeks to evade what moves away from the individual actor. In terms of the “political”, liberalism is characterized by a rationalist, individualist and universalist approach that prevents the acknowledgement of collective identities (especially when they do not follow the premises of the liberal paradigm), rendering it totally unable to understand the pluralistic nature of the social world, and necessarily, the fundamental political conflicts this pluralism entails. Liberalism elides the political antagonisms of a pluralist conception of the world under the premise that, because of empirical limitations (such as, for example, in the case of liberal internationalism, the need to prevent

⁴⁵ Chantal Mouffe, *On the Political* (London: Routledge, 2005) at 8.

⁴⁶ *Ibid* at 9.

⁴⁷ *Ibid* at 10.

⁴⁸ Carl Schmitt, *The Concept of the Political* (New Brunswick: Rutgers University Press, 1976).

⁴⁹ *Ibid* at 70.

destructive conflicts and loss of life), the realization of the ontological possibilities of the political is impossible. However, the answer to this ontological denial is that liberalism can offer a social realm based on contained politics and policy frameworks for the realization of a non-conflictual vivre-ensemble. Liberalism thus negates the political and the non-liberal ontologies that constitute it in order to set a framework of social relations between individuals that act “rationally”, under an accepted common sense, which is circularly premised on the rules that set the boundaries of the instituted social framework. The legitimation of rationality and liberal common sense that theoretically acknowledge the superiority of liberalism are, in other words, self-contained in liberalism, in its set of politics, its common sense, and its denial of the political. Liberal rationality is set on the “universal” epistemic premises of liberalism.

It must be kept in mind that “the social is the realm of sedimented practices, that is, practices that conceal the originary acts of their contingent political institution, which are taken for granted, as if they were self-grounded.”⁵⁰ In other words, the idea of a society is self-contained, as if it had always existed in and of itself naturally, when it is in fact based on a set of contingent practices premised on the elision of the political antagonisms that have instituted it. While the rules of the social and the political are technically separated, their boundaries are somewhat unstable in the sense that the social is created by a constitutive hegemonic political iteration that bypasses existent intersubjective social relations.⁵¹ Political antagonism is then foundational to the act of hegemonic institution of a particular view of the “social”, entailing that the boundary rules that contain this social (the accepted actors of this society, the favoured types of relations, etc.) are premised on power relations that seek to obliterate a vanquished political ontology. The “common sense” existent at a given time and the “naturalness” of an order is the result of “sedimented” practices that seek to conceal the originary act of violence that established the social. Then, “it is never the manifestation of a deeper objectivity exterior to the practices that bring it into being”⁵². Rather, the social is totally dependent on hegemonic practices, such as the articulating practices through which the order is created and its social institutions are fixed.⁵³

⁵⁰ Mouffe, *supra* note 45 at 17.

⁵¹ Ernesto Laclau, *Emancipation(s)* (New York: Verso, 1996) at 90.

⁵² Mouffe, *supra* note 45 at 17–18.

⁵³ *Ibid* at 18.

Following the canon of political theory then, one of central elements of liberalism is the availability of a “universal” consensus grounded in a particular type of reason.⁵⁴ However, this consensus is based on liberalism’s hold on the concept of reason, and its rejection of the Other’s political ontology. A fully inclusive negotiated consensus that would account for both sides of the friend/enemy political divide is thus impossible because every *rational* consensus is based on the exclusion of the *irrational* enemy. Indeed, antagonisms that are found in the realm of the political are irreconcilable with the idea of rationalism, as this method negates the possibility that opposing poles - one that will be confirmed as rational, the other less rational or irrational - can both be reasonable solutions. Rationalism cannot epistemically justify the reasonability of what is perceived as irreducible antagonisms that could politically coexist, and thus constitutes an ontological and epistemic negation of the other pole of the antagonism. Liberal theory has to negate the possibility of a normalized political antagonism since it reveals the limits of the rational consensus, and the constitutive character of this omission for the liberal social order. This order then originates from the exclusion of other ontological and epistemic possibilities, establishing its rules and articulatory practices as the only ones valid, or to use liberal terminology, rational, because of the hegemonic circularity of liberalism’s hold on the political.

The social order this system creates is premised on a liberal rationality that decides of the rules of its social boundaries, as well as the acceptable power relations within those boundaries, the rules of acceptable *politics*. However, as I have sought to highlight, those boundaries completely elide the possibility of the political, and thus the possibility of a negotiated politics of ontological co-existence, because of the hegemonic power acquired by a self-referential liberal system of rules that bases its legitimacy on its own rationality, and excludes its antagonisms. Under a liberal political system, the existence of a political conflict at its origin is systematically presented as non-existent for the purpose of a claim to a liberal *political consensus* affirming the universality of liberalism. This elision allows for the workings of a non-antagonistic social that functions according to a self-referential universalized set of politics and policy contained by liberalism. The following sections of this essay will seek to explain in more depth this situation with a case in point, and to disentangle the knot of exclusion created by the elision of the political in liberal internationalist theory. The following sections shall provide background on the iteration

⁵⁴ *Ibid* at 11.

of the exclusion of political ontology in the case of Persia/Iran, through the entwinement of the international law with the matrix of coloniality.

Concluding this section with a note on international law, I would like to briefly discuss Marti Koskenniemi's findings on the politics of international law, and explain how my understanding builds on his inquiry but focuses on different issues. Koskenniemi argued that the constant oscillation between international law's need to verify the content of its norms by reference to the behaviour of its actors and the field's concomitant requirement of an impartial ascertainment of those norms regardless of the behaviour of those actors hints directly at the ambivalences at the origin of the system.⁵⁵ Indeed, neither one nor the other of those dynamics can sustain a positive system of its own, but rather also require the action of the other phenomena⁵⁶, which still leaves law indeterminate and lacking in objectivity. This indeterminacy and lack of objectivity then hints at the fact that the argumentative practices of lawyers require reference to politics, including moral-political choices to choose between contending legal arguments.⁵⁷ In other words, Koskenniemi's central claim is that international law is political because legal actors make choices on the basis of competing international legal arguments through their political choices. However, while Koskenniemi's argument robs liberal international law and its historical logic of primacy over politics,⁵⁸ of its universalist and objective seating, it elides the question of the alternative rooting of the normative order. As I have proposed previously drawing from Mouffe, the practices of the (international) social realm conceal the originary acts of their political institution, which are taken for granted as if they were self-grounded.⁵⁹

While Koskenniemi recognizes the Eurocentric and liberal epistemic rooting of the discipline⁶⁰, he does not fully address the epistemic and ontological role of the colonial order in the structuration of international normativity. What I mean by this is that while I follow Koskenniemi throughout his argument, I would like to propose an additional point relating to the relationship between knowledge and power, and the effect this has on ontology. I would contend

⁵⁵ Koskenniemi, *supra* note 6 at 219.

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at 536.

⁵⁸ Koskenniemi, *supra* note 6 at 33–76.

⁵⁹ Mouffe, *supra* note 45 at 17.

⁶⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International law, 1870-1960* (Cambridge: Cambridge University Press, 2002).

that the field in which the negotiation of legal norms is made is premised on a deeper project that rigs the possible resolutions of the negotiation. In other words, the epistemic possibilities that might resolve international legal disputes are premised on a historical project which this research will seek to unearth, and that I would hypothetically call following Walther Mignolo the project of modernity/coloniality.⁶¹ The argument I am making is that liberal international law is never a manifestation of an objectivity of its rules, as it claims, but rather a system of domination premised on an original project of colonial hegemony that justifies and legitimates itself through its epistemic and ontological supremacy. I believe that the unearthing of this project undermines the logic of the structure of international law, its establishment of a “global epistemological order”⁶². Highlighting the effect that modernity and its colonial darker side has had on international law calls for a post-modern, but also and more importantly, a decolonial restructuring of the discipline. This is not to mean that international law is irredeemable no matter what, but rather that it has to be exorcized from its claim to universality seeped in Eurocentric language. If international law is to be anything close to being universal, it cannot be based on the elision of the *political* negotiation at its source. By forgetting the process of dynamic negotiation, the interactions that lead to the formation of norms, and concentrating only on avowedly “universal” rules, we reduce law to a mere “artefactual inquiry”⁶³, a reified specter of what it really is. The positing of a universal then leaves non-subjects with the possibility to become a subject or not, and for subjects to accept or reject norms, the *politics* or acceptable practices of the “universal” *political*, with no in-betweens, and no further ontological possibilities.⁶⁴

B. Modern International law and the Project of Modernity/Coloniality

“It is not the religious beliefs, whether right or wrong, which are opposed to culture and material progress, but that belief which prohibits learning of sciences, earning one's livelihood and the ways of culture. I do not believe that there is any religion in the world which opposes these things. I would rather say that it is non-believing which inevitably leads to disorder and distortion of culture as in the case of the Nihilists.”

⁶¹ Mignolo, *supra* note 9; Walter Mignolo, *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (Durham: Duke University Press, 2011).

⁶² Barreto, *supra* note 36 at 402.

⁶³ Roderick A Macdonald & David Sandomierski, “Against Nomopolies” (2006) 57 N Ir Legal Q 610 at 617.

⁶⁴ *Ibid* at 620.

Liberalism left a serious imprint on the psyche of the Islamicate world. Indeed, the Ottoman *Tanzimat* reformist project opened the Ottoman Empire, its elite and intellectuals to the idea that their weakness and backwardness was attributable to their Islamic tradition, leading to an apologetic appeal to liberalism, emphasizing that Islam was in fact similar and compatible with it⁶⁶. Europeans, seeing an opportunity, intensified their half-century long project of Ottoman modernization, and promised amongst other things, sovereign equality to the Empire upon its entry into the modern world. However, Judge Bedjaoui, introduces his edited volume on international law, by noting that;

“[b]efore the First World War there was an ‘exclusive club’ of States which created what has been called a ‘European International law’ or a ‘European public law’, which broadly speaking, governed relations not only among members of the ‘club’ but also between them and the rest of the world. If the scope of this law, which was geographically specific, had a universal character, it had nevertheless been conceived simply for the use and benefit of its founders, the states that were called ‘civilized’.”⁶⁷

The Ottomans remained on the periphery of this select club of European nations. Indeed, even if the capitulations to which the Sultanate was submitted were, in themselves, sites of contestation of Eurocentrism, it is hardly possible to claim that they were treaties signed on the basis of equality, and thus that the international normative system they formed was one based on sovereign equality.⁶⁸ This establishes that the only thing this “international” law had of “international” was its name for it did not recognize the equal and valid claims of either semi-peripheral⁶⁹ states or “uncivilized” people (colonies, protectorates). It is then my claim that capitulations, and more broadly international law, were vectors of modernisation and thus of European cultural imperialism, of which Kemalism was the central proponent in the Middle-East.

⁶⁵ As quoted in; Anwar Moazzam, *Jamāl Al-Dīn Al-Afghāni, a Muslim Intellectual* (New Delhi: Concept Publishing Company, 1984) at 13.

⁶⁶ AbdulHamid AbuSulayman, *Towards an Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (Herndon: International Institute of Islamic Thought, 1987) at 46–47.

⁶⁷ Mohammed Bedjaoui, *International law: Achievements and Prospects* (Leiden: Martinus Nijhoff Publishers, 1991) at 5.

⁶⁸ For more on the capitulations, see the thorough analysis proposed by Umut Özsü ; Özsü, *supra* note 22; Umut Özsü, “Ottoman Empire” in Bardo Fassbender & Anne Peters, eds, *The Oxford Handbook of the History of International law* (Oxford: Oxford University Press, 2012) 429.

⁶⁹ See Becker-Lorca’s thorough study of the question. Becker Lorca, *supra* note 22.

Such a means of operation paved the way for what would follow the First World War; the European occupation of the dismantled Ottoman Empire, and extension of Western hegemony to its farthest confines. The occupation of the last non-Western Empire led to the extension of the European project of modernity and empire, under the guise of international law, to 85 percent of the globe.⁷⁰

Liberalism's influence in the region displayed some quite interesting ambivalences that constantly reiterate the situation proposed by Bedjaoui, namely the empty promises of universalism of the international legal structure. During the war, Arab elites revolting against Turkish modernization were promised sovereign power and equality by the allies in exchange for their help against the Ottoman Empire. Following the war however, the hopes of the Arabs were shattered under the League of Nations' mandate system, which relegated the constituent parts of the dismantled Empire not to a sovereign status, but to a status of tutelage entrusted to a European power. This power, while it was, in theory, to follow the expressed wishes of local populations, was invariably European, and was to help those "peoples not yet able to stand by themselves" to face "the strenuous conditions of the modern world"⁷¹. Arguably, and especially looking at French and British exactions against civilian populations, local institutions and aspirations were hardly taken into account, leading to the creation by mandatory administration of state structures on the Western model. International law in this instance served the purpose of producing legal justifications for the appropriation of the lands of backward or uncivilized people⁷², doing so under the pretence of a civilizing mission, a project widely demystified in international law by, amongst others, Anghie and Koskenniemi⁷³. This section will seek to further explore this question, and provide an inquiry into the meaning of legal Orientalism, especially as it relates to the Middle East.

On a first note, I would propose that the studies of the aforementioned authors are slightly insufficient in that they fail to tie together the projects of international law and modernity. While

⁷⁰ Said, *supra* note 9 at 122.

⁷¹ League of Nations, "Covenant of the League of Nations", (28 June 1919), online: Avalon Project - Yale University <http://avalon.law.yale.edu/20th_century/leagcov.asp>, art. 22.

⁷² Jean Allain, "Orientalism and International law: The Middle East as the Underclass of the International Legal Order" (1999) 17:2 Leiden J Int'l L 391.

⁷³ Anghie, *supra* note 14; Koskenniemi, *supra* note 60.

the authors are certainly well aware of international law's modern rooting and its enforcement of differential divides, the link that is missing in their investigations is with the underlying epistemic and ontological project of modernity, as it was exposed by Walter Mignolo. The claim proposed by Mignolo is that European modernity, as an epistemic project of European superiority, has always been followed by its underside, the matrix coloniality, from its inception in the Renaissance.⁷⁴ Coloniality refers to a matrix of power that seeks the interrelated management of authority, Being (subjectivity), economy and knowledge.⁷⁵ European knowledge, through the institution of a superiority of some languages and knowledge forms over others and the direct colonization of space created a Eurocentric form of knowledge against which all other knowledges would be compared.⁷⁶ The interrelation between the modern European and its other is the project of modernity/coloniality. Indeed, underlying this project is the effect that some ways of making sense of the world, of signifying meaning, of Being, were considered lesser than others – they were not “coeval”, or equivalently rational to the canon of European knowledge on which it was to be judged⁷⁷. A clear divide is then created, and people and their authority and knowledge(s) are ranked not from the basis of their actual corpo-reality, experience, or of their Being, but from the imperatives of the specific modern European knowledge.

In the contemporary world, this process has been discussed by Santos as being modern reason's propensity to “abyssal thinking”; a form of thinking that establishes a distinction between the knowledges produced in the North and the South.⁷⁸ The metaphor of the abyss is used to convey that Western thinking has for a long time organised the production and authentication of knowledge along the form of a precipice on top of which Western epistemology reigns supreme over the multitude of knowledges that are still at the bottom of the precipice. Abyssal thinking, inherent to the project of modernity, creates a sheer time and space divide between the modern and its opposite. Modernity and coloniality are then the two constitutive sides of the same coin.

⁷⁴ Walter Mignolo, *The Idea of Latin America* (Malden: Blackwell Pub., 2005) at 1–50; Mignolo, *supra* note 9.

⁷⁵ Walter Mignolo, “Coloniality: The Darker Side of Modernity” (2009) *Modernologies* 39 at 49.

⁷⁶ Mignolo, *supra* note 9.

⁷⁷ Fabian describes how modern European sciences were central in establishing this structure of time difference. Johannes Fabian, *Time and the Other: How Anthropology Makes its Object* (New York: Columbia University Press, 1983).

⁷⁸ Boaventura de Sousa Santos, “Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges” (2007) 30:1 *Review* (Fernand Braudel Center) 45.

However, we find that this two-sided project suffers from an undeniable instability⁷⁹ at its core; while claiming universality, its underside lies in the rejection of the Other. In other words, the Eurocentric project is *critically* unstable as its instability is both a critical threat to (in the sense of critique) and a constitutive element of the project. As I will propose, the project of modernity maintains the capacity to narrate *politics*. It is a *political* claim iterated from a hegemonic position in order to dominate other political epistemes. This then allows for the possibility to contain the project's critical instability, as it allows for the elision, the hiding from sight of the foundational political violence that renders it unstable. This epistemic domination allows the hegemonic ideology (liberalism) of the modern project to appear both liberating and dominant, but not unstable. To do so, it hides from sight that it is constituted through a rejection of the Other, and that this rejection is both fundamental to its creation as the project of liberal internationalism, but also deadly to it as it undermines the avowed objectives of this project.

The creation of externally narrated spatial and temporal differences in the modern project is the instituting force of the colonial matrix of power (or coloniality).⁸⁰ The matrix, this dominant epistemic power, congregates spatial/temporal and imperial/colonial differences, leading to an opposition between on the one side, the world of the civilized colonial master, and on the other, that of the “damné”, the savage colonized. Now, the analytical strength of the concept of the matrix of coloniality is that it allows us to understand how imagined geographies (the imagined divides and borders that allow the “West” to “invent” the Other (or the Orient) as a geographic and cultural space of exception⁸¹) are transplanted into actual real life divides. Necessarily, this Western self-constituted totalizing worldview has the imperial claim of representing the whole world for what is not on one side of the divide is on the other. What I mean by saying that the modern is “self-constituted” is that it does not rely on categories that are pre-existent to it, but on its own concepts and categories to create itself and the Other, and thus does not understand the Other in its own terms, but creates the Other from a modern perspective.

⁷⁹ I draw inspiration on this concept of “critical instability” from; Peter Fitzpatrick & Patricia Tuitt, *Critical Beings: Law, Nation, and the Global Subject* (Burlington: Ashgate, 2004) at xi–xx; Sundhya Pahuja, *Decolonising International law: Development, Economic Growth, and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) at 25–37.

⁸⁰ Walter Mignolo, “Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of De-Coloniality” (2007) 21:2/3 *Cult Stud* 449 at 475.

⁸¹ Edward W Said, *Culture and Imperialism* (New York: Vintage Books, 1993) at 3–15.

It presents a normative claim that it then has the power to enforce as a normative reality, then becoming a *political* consensus that enforces a frame of *politics*, or rules that structure the relations between the originally self-constituted poles.

Such imagined geographies then normatively claim and create, from a “norm” based on the experience and categories of Europe, zones of exception that are not “Europe”. In such zones, colonial powers dominate, under an established frame of rules that delimit relations with the Other, to the deepest reaches of the “deviant”, non-European/modern life of the colonized “damné”. “Damnation” represents the exception of the Other from existing as an ontological possibility in a normative realm; it refers to the corpo-reality of the fact of non-life, not of “death” as the colonized is not necessarily killed, but rather to that state of denial of Being. Indeed, colonization is not only a mere physical act, but also, as the matrix shows, one of epistemological and ontological domination that institutes a coloniality of Being⁸².

This coloniality of Being, the lived experience of the colonized oppressed subject as defined by Fanon⁸³, their experience of being produced as an exception, as a non-European, is entwined to the modern/colonial normative structure. Therefore, I claim that the coloniality of Being is centrally entangled with modernity’s *critical* self-constitutive capacity, to the imperial powers’ dominant epistemological ability to create imperial geographies organized around the formation of borders between the “modern” and the “colonial” worlds. Imperial powers, through epistemic domination, institute and normalize what is “inside” their realm and what is “outside”. This refers to what Pahuja has called international law’s ability to “cut”, and define what is inside and what is outside of its self-defined categories.⁸⁴ The link between the modern/colonial normative exercise and the coloniality of Being then is that capacity of this project to muster the power of a normative structure to create the wretchedness of the Other, and impose a pattern of rules, a set of politics, to rule over the relations with this other. This would be, I claim, international law.

⁸² Maldonado-Torres, *supra* note 29 at 242–245.

⁸³ Frantz Fanon, *Peau noire, masques blancs*. (Paris: Editions du Seuil, 1952); Maldonado-Torres, *supra* note 29.

⁸⁴ Pahuja, *supra* note 79 at 25–32.

However, in radicalizing such constituted differences between contending ontologies, the project of modernity/coloniality shows its inherently political nature. This nature highlights how the project's claim to Enlightenment lineage is undermined by its own imperial political project. Enlightenment rationality, on which modernity is founded, was based on the claim that there existed a set of absolute natural rights to which every person was entitled. Those rights, for Locke, were grounded on mutual security and the inalienability of rights such as the equality and freedom of all mankind.⁸⁵ However, the colonial matrix of power, through its predisposition for abyssal thinking radicalizes the opposition of ontologies, and from its abyssal rationality (based on an opposition of Enlightenment reason to the Other's irremediable irrationality⁸⁶), forces a violent imposed *political* solution a conflict (or perceived conflict) between ontologies, rather than a negotiation. The project of modernity/coloniality is then a foundational act of *political* violence between contending ontological voices that will be resolved in one taking over the other in a bid to universalize its ontological existence, its sense of purpose.

The *critical* element of this instability lies in the fact that realization of the purpose of the imperial project of modernity requires that this same project contradicts its fundamental purpose of universal rights by denying them to an identified Other. What I mean is that following the resolution of the political dispute, the "damné", the colonized, is reduced to the minimal capacity of humans to "be", dismissed from the "universal" promise of modernity as its Being is denied from it by the colonial matrix that deems it irrational, aberrant. The colonized is damned to a life of non-life. Colonial people cannot "be" themselves, see themselves in their own schemes of reference in their own ways of understanding the world, leaving them to the lowest level of the political scale, that of "bare life".⁸⁷ The colonized is then one who is excluded from the political, a non-political non-Being, a "bare life" that seeks the mere "right to have rights"⁸⁸. The colonial matrix of power then seeks the obliteration of the political capacities of the Other, its Being, so as to institute and maintain the rules and order as contained in the ontic manifestation of politics that

⁸⁵ John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Company, 1980).

⁸⁶ This was argued early on by the Christian Church, and later in the thought of the Dominicans of Salamanca, "fathers of international law". On this see amongst others John Victor Tolan, *Saracens: Islam in the Medieval European Imagination* (New York: Columbia University Press, 2002); J A Fernández-Santamaría, *The State, War and Peace: Spanish Political Thought in the Renaissance, 1516-1559* (Cambridge: Cambridge University Press, 1977).

⁸⁷ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998) at 47–48.

⁸⁸ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & World, 1966) at 298.

fit under the political boundaries defined by the liberal paradigm. Modernity/coloniality is then, in reference to Mouffe, that project which conceals the originary act of political institution, the original violence that gives the political its sense of self-groundedness.⁸⁹ This project, as I have said, is also *critically* unstable as it undermines its own purpose, pointing at its fundamental *malleability*.

Consequently, the capacity of the project of modernity/coloniality to capture its own meaning is inherently tied to the functions of the law. Agamben has proposed in *Homo Sacer* that one who is excluded from the law is also fundamentally included in the law for it is a normative framework that defines the Other, the outlaw as such; he is constituted and captured by the framework that eliminates it.⁹⁰ Then, premised on an ontological abyssal divide, a normative system will integrate into law those same divides and enforce its political ontologicidal impulses. The normative system then acts as an ontological guardian in order to maintain the “consensus” of the foundational political moment. Legal sanctions and actions then represent the disciplinary means to establish and enforce the need to remediate the Other’s imagined difference. A normative system then has the power to institute “bare life”; to decide who and what is and is not law, what it means to be a legal subject and then what is and is not part of the existent political setting that deploys a normative structure. In that sense, the logic of self-groundedness and appeals to universality of the project of modernity/coloniality is produced through its normativization in a legal order. A legal system then perpetuates the initial act of violence of the modern/colonial project as well as its misrecognition of the Other’s perceived abyssal difference, and thus maintains its critical instability, even if it seeks to enact a set of relatively stable norms. The critical instability is maintained because it suffers from an immanent critical flaw; the gap between its damning abyssal reality and its normative claim to universality.

For modernity then, a normative system enshrines its self-constitutive capacity, and seeks to stabilize its critical instability. Its purpose is then to delimit, along definite parameters, what amounts to legal personality, and what amounts to the non-legal, to lawlessness from the perspective of the modern. In international law, the creation of a legal/non-legal boundary is

⁸⁹ Mouffe, *supra* note 45 at 17.

⁹⁰ Agamben, *supra* note 87 at 8.

articulated around the principle of national sovereignty⁹¹, and, using Beaulac's expression, the "etiological" myth of the Peace of Westphalia.⁹² Beaulac's claim was that, after Westphalia, the concept of sovereignty, whether an actual reality or not, became the keystone of the discipline; it became the central linguistic signifier according to which relations between (European) nations were given meaning. Westphalia and sovereignty *created* a new reality whose meaning was meaningful only through a perception of sovereign equality.⁹³ The myth of Westphalia then inaugurated the state as the central legal actor of modernity.

The legal personality of the state then becomes the medium through which the project of modernity becomes articulated, as tributary to its foundational ideological *political* consensus (the particular Eurocentric consensus that states, and only states, are legal subjects).⁹⁴ The concept of national sovereignty maintains a vantage point in the translation of the project of modernity in international law; it is the articulating keystone of the project, the mythicized standard from which there is modernity, outside of which there is only myth and tradition. The *political* standard thus set is the signifier from which *politics* will be articulated, for they have to follow the *political* consensus. In other words, the state becomes a non-negotiable political standard, and its politics become the space of transition from the particular (particular and competing experiences of tradition or myth, for example, all vying for hegemony) to the universal (the reality of a perpetual peace, or at least a regulated system brought about by states). Statist parameters define how a "colonial particular" attains the status of perfection of "universal" modernity. The state offers the model from which the colonial can attain the modern, from which "bare life" can become a subject.

International law then is fixed on a foundational ideological claim, hegemonic liberalism, and its related episteme and ontology are based on the "European ego as the sole locus of inter-

⁹¹ The ICJ, one of the central canonical authorities of the discipline said in the *Nicaragua* case that it was the "fundamental principle on which the whole of international law rests". See; *Military and Paramilitary Activities (Nicaragua v. United States)* (1986) ICJ Rep. 14, at par.263.

⁹² Stéphane Beaulac, *The Power of Language in the Making of International law: The word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden: Martinus Nijhoff Publishers, 2004) at 70, 185–187.

⁹³ *Ibid* at 70.

⁹⁴ Ruskola proposes that the state is a central technology of modern law; Teemu Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Cambridge: Harvard University Press, 2013) at 9.

communal relations”⁹⁵. The lack of the attributes of the European (statist) Ego is then “outside the law”, and ill/legal, because the “law” is situated in the European experience.⁹⁶ Any legal tradition and the practices evolving from the other side of the divide are then inherently suspect as they are defined by their “lack” of what law is, of what the “modern” is, and can only be peripheral to the discipline⁹⁷. International law, supported by the project of modernity/coloniality then produces its subjects and objects, which do not necessarily build upon an existent external reality of factual elements. International law then does not merely apply to existent “nations”, but constitutes them, it creates the standard of “nation” by reference to its underlying modern/colonial epistemic and ontological framework. As a part of the project of modernity/coloniality, it then possesses a self-constituting power to “define” its categories and “definitional truths”⁹⁸, but also the critical instability of the project. While this might appear rather theoretical and abstract, the following chapter will analyse how this scheme translated in the case of Persia/Iran at the beginning of the 20th century.

I would claim that international law and the modern/colonial project follow the same biases and ambivalences as both are resulting from the same sedimented political act of violence that seeks the outcome of a totalizing western worldview⁹⁹. I would submit that the early constitutive role that the modern international legal concept of borders has had for the constitution of Europe in the sixteenth century exemplifies this.¹⁰⁰ Imaginary Borders established for example through the Treaty of Tordesillas, or the expulsion of Jews and Muslims from Southern Iberia were central in separating Europe from the colonial zones, and were central for the establishment of early international law with the School of Salamanca. As Anghie has argued about Vitoria, what the Dominican was concerned with was not so much the issue of order among states, but rather that of order among culturally different societies, an inter-cultural

⁹⁵ Siba N’Zatioula Grovogui, *Sovereigns, Quasi-Sovereigns, and Africans. Race and Self-determination in International law* (Minneapolis: University of Minnesota Press, 1996) at 24.

⁹⁶ Annelise Riles, “Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture” (1993) 106:3 Harvard Law Review 723.

⁹⁷ Antony Anghie, “The Evolution of International law: Colonial and Postcolonial Realities” (2006) 27:5 Third World Q 739 at 739.

⁹⁸ Pahuja, *supra* note 79 at 26–27.

⁹⁹ Santos, *supra* note 78 at 46.

¹⁰⁰ And even earlier with the establishment of such a border with the radically different and, from a European perspective, inferior world of Islam. Mégret & Cardinal, *supra* note 30; Janet L Abu-Lughod, *Before European Hegemony: The World System A.D. 1250-1350* (New York: Oxford University Press, 1989) at 2–6.

perspective.¹⁰¹ The problem was to be regulated by a universal legal framework derived from the social practices of (European) societies, then accepted as natural law.

However, Vitoria's understanding of whose social practices were to bear in the creation of this system is telling. The Indians, because they were technically capable of "universal" reason as any other human being had to follow the dictates of natural law. However, it was the sheer irrationality of the Indians, of their practices, customs and lack of organization that brought on them the ire of international (or natural) legal sanctions.¹⁰² The international legal framework then replicated the very specific interest of imperial-minded Christian Castilian individuals. The system was to necessarily be universalised by bringing it to the uncivilized, not to be negotiated, but to be implemented by all means necessary. Then, the legal instalment of "international" borders, separating states as well as states/non-state actors, while providing and enforcing a legal conceptualization of the world, also had the broader meta-narrative effect of implementing the abyssal separation between knowledges. The creation of borders was the real manifestation of the political confrontation between the civilized and the uncivilized world, the modern and the colonial.

The definition and delimitation of states allowed Europeans to differentiate between friends and enemies, between zones of law, and zones of lawlessness, zones that had "accepted" the European modern imperative, and those who still had a different ontological existence. The creation of fixed borders in the international legal realm then instantiates "imagined geographies". It is thus no surprise that modern international law emerges as a vector of modernity/coloniality, reproducing the biases and the epistemic privilege of the modern. The modern method of abyssal thinking, when transposed in international law, becomes a modern technology of knowledge specialized in making distinctions, radicalizing them and giving them effect in the world through a set of norms and principles.¹⁰³ Long standing doctrines of intervention, from those which allowed Spanish conquistadors to rectify the irrationality of the

¹⁰¹ A Anghie, "Francisco De Vitoria and the Colonial Origins of International law" (1996) 5:3 Social & Legal Studies 321 at 331.

¹⁰² *Ibid* at 331–332.

¹⁰³ Barreto, *supra* note 36 at 403.

Muslim kingdom of Granada, to our contemporary responsibility to protect, bear that mark of abyssal thinking in the way they institute a normative based on unequal sovereign equality.

International law, under the impetus of the project of modernity/coloniality develops the capacity to dominate the Other's ontological and epistemological existence. Naturalist jurisprudence in international law precluded the genuine possibility for an inquiry into the modes of Being of non-European societies because it focuses solely on the phenomena established as rational by European societies under the jurisprudence of the time of the Salamanca school or Grotius.¹⁰⁴ Paradigmatically then, international law, because of its early foundation on the European experience has elided the problem of the legal order that existed amongst non-European nations, as they were deemed non-modern, too different and thus incapable to bring to bear on the Eurocentric problem of order amongst states. Theoretically then, this reduces the Other to a "bare life" under international law, forcing it inside the realm of a political decision that has not been negotiated, but imposed, namely, the "consensus" on the universality of modernity. This then breaks the Other into the epistemic and ontological realm of the modern. While this does not necessarily amount to physical destruction of the Other, it does amount to at least the elimination of its different ways of seeing and organizing the world.

When a bare life is legally situated in a space of exception where there is no power, no sovereign authority, a zone ripe for the taking by a colonial master that is situated on the other side of an imagined border, the normative apparatus that has made it into this bare life status has the legal capacity to sanction the enforcement of its own norms and standards on the bare life by any means necessary. If we return to the introductory quote from Bedjaoui, we realize that there appears to be concordance between his assessment of the existence of a pre-WWI select club of European states, and the existence of a matrix of power enforced by international law. There would indeed appear to be, at first sight, a differentiation between the civilized European and their periphery, an assessment already made by many. The following section will engage in a more in-depth analysis of this relationship with regards to the effects of international law in the lands of Islam, the reproduction of the project of modernity/coloniality and the elision of the question of the "political".

¹⁰⁴ Anghie, *supra* note 97 at 741.

Chapter 2 – The Modern and the Traditional; Coloniality in Iran

“The concept of progress, i.e., an improvement or completion (in modern jargon, a rationalization) became dominant in the eighteenth century, in an age of humanitarian-moral belief. Accordingly, progress meant above all progress in culture, self-determination, and education: moral perfection. In an age of economic or technical thinking, it is self-evident that progress is economic or technical progress.”

- Carl Schmitt, *The Concept of the Political*¹⁰⁵

As proposed previously, the project of modernity/coloniality is transposed in international law by the creation of an “Other” under the legal values and categories of Western international law. In this section, I will seek to prove this argument by relying on the Western international structure’s relationship with the Islamic world. I will seek to argue that this structure replicated the project of modernity/coloniality and sought to eliminate the political capacity of Islam, and from there, its capacity to participate into a negotiated political consensus. My claim is that this was done through several phases of modernization ported through the international legal framework. To raise one caveat however, my claim does not transpose into the pre-modern period. Indeed, as, for example, Judge Weeramantry argued in his thorough study of the pioneering work of Islamic jurisprudence in numerous fields of international law¹⁰⁶, Islamic law has arguably had a foundational role in numerous international legal doctrines. Rather, my claim is that, from the inauguration of the modern/colonial project, Islam as a political narrative has been erased from the genealogy of international law, which became a strictly European project.

I propose that international law offered a subtle but destructive statement of the modern/colonial project that reproduced the prejudiced premises of Orientalism in the legal form. This “legal Orientalism” translated Orientalist biases in legal variations, inscribing international law into the project of modernity/coloniality. The argument will be articulated around the oppositions that Orientalism has made between the modern and the traditional, Western democracy and Oriental despotism and the underlying essential opposition of the West and Islam

¹⁰⁵ Schmitt, *supra* note 48 at 86.

¹⁰⁶ Christopher G Weeramantry, *Islamic Jurisprudence: An International Perspective* (New York: St. Martin’s Press, 1988).

that required a move from the latter to the former. Montesquieu's *Lettres Persanes*¹⁰⁷ for example substantiated claims that the despotic kingdoms of the East were in fact lands of lawlessness, which justifies their subtraction from the privileges of a European community. This binary denotes the idea that modernity, a later stage in history, happens “when one sheds the substantive limitation imposed by traditional values and ways of life. Substantive values limit one's access to a wider field of possibilities; the widest field of possibilities is correlated to an “empty” self, defined by its formal role of maximizing chosen satisfactions or attaining its goals with greatest efficiency.”¹⁰⁸ This however requires taking for granted the idea that modernity is a disinterested, value-free, objective episteme, way of life, or political ontology.

My claim is that legal Orientalism reproduced such biases in international law by relying on the dynamics of modernity/coloniality and its enforcement of systematic differences between the West and the Orient.¹⁰⁹ I will propose that this enforcement was perpetrated by the specific technologies of international law that followed the Orientalist mode of operation, and more precisely, as we will see shortly, through capitulations, concessions, and the process modernization. I argue that the premises of those technologies and modes of operation of international law were premised on, and translated in reality the biases of the modern/colonial project. Those biases were then integrated in the multitude of ways to understand the world from the Orient through the vector of legal Orientalism. The West's representation of the Orient as essentially backward, unchanging, uniform and stagnant involved an undying faith in the perception that European progress was inherently superior to that of the Orient, giving Europe a historical mission in the salvation of the Other. Salvation, however, was only realisable by following the canon and gospel of “the agency [and the] the path of [...] the main European historical agents and their needs.”¹¹⁰ The transmission of international legal subjectivity in the form of the institutions and governance model of sovereign state authority were central to the project. In other words, what I claim is that the crucial role that the law played in constituting the idea of a modern Western international legal subject has been that of establishing the hegemony

¹⁰⁷ Most notably see ; Charles de Montesquieu, *Lettres persanes* (Oxford: Voltaire Foundation, 2004).

¹⁰⁸ David Kolb, *The Critique of Pure Modernity: Hegel, Heidegger, and After* (Chicago: University of Chicago Press, 1986) at xii.

¹⁰⁹ On the themes of Orientalism see ; Salman Sayyid, *A Fundamental Fear: Eurocentrism and the Emergence of Islamism* (London: Zed Books, 2003) at 31–32; Said, *supra* note 9.

¹¹⁰ Gathii, *supra* note 20 at 199–200.

of a loosely-defined state form (to include the existence of extra-European states), and of a more specific European model of governance in the lands of Islam. It is the effect of that process that I wish to explore.

In that sense, while I generally agree with Özsü, I cannot follow his proposition that “semi-civilized” states like Persia could negotiate the frameworks of international law with a certain degree of agency, or that concessions and capitulations were sites of agency. He contends that the relative residual power of those states and their proximity to commercial hubs is what gave them agency as “semi-peripheral” states.¹¹¹ My claim is rather the opposite, in that while the “semi-periphery” could maintain an “intermediate” status, this status was one of submission to the epistemic and ontological imperatives of the states of the “core”, the West, under the project of modernity/coloniality. While I do not think that I stand in disagreement with what Özsü has written about the Ottoman Empire and the inherent fluidity of capitulations as sites of contestation¹¹², I think that we address slightly different questions. Özsü’s claim, similar to that of Becker-Lorca in a way, proposes a mitigating account that portrays the agency of Western and Ottoman actors in international law. However, and this is where we totally agree, the Ottoman Empire was, at best, a semi-peripheral state, and “these states were deemed to be sufficiently ‘civilized’ to engage with the West on something approaching an equal basis, [...] but not ‘civilized’ enough to forego extraterritoriality”¹¹³.

However, I would like to establish that I do not claim that Eurocentric international legal norms directly, and vertically imposed the European model on states like Persia. I rather think that there was definitely a form of indirect imposition, but also that the Eurocentric model was well received by Persians. What this highlights then is that there is no clear line that separates coercion and consent in this process. In fact, Persians, much like the Ottomans very often more or less willingly submitted themselves to the principles and rules of Western international law, and as Özsü and Becker-Lorca claimed, found a place to exercise their agency in this structure. Still, I don’t think that this affects the central focus of my argument; it remains that by doing so, Persians accepted to submit themselves to the ontological and epistemic premises of

¹¹¹ Özsü, *supra* note 33 at 246.

¹¹² Özsü, *supra* note 68.

¹¹³ Özsü, *supra* note 22 at 124.

Eurocentrism, and thus were forced under and hermeneutical scheme that denatured their own ways of understanding the world, as it was informed by Islam.

What I will seek to prove moves to another focus than that of Özsu. While physical colonization was not necessarily the reality of the semi-periphery (it sometimes was, as we will see), epistemic and ontological coloniality was still their reality, especially so long as they sought to replicate the standards of modernity in order to be received in the club of civilized nations. As I argued previously, modernity was a process that went hand in hand with coloniality. The underlying claim I propose then is that the encounter between conflicting ontologies between modern liberalism and its Other, premised on the modern/colonial project, could never be realized on equal terms. They inscribed the exchange between ontologies in a structure of political violence enshrined in the project of modernity, a violence that sought the obliteration of the deviant, non-modern ontology. In that sense, my claim is compatible with that of Özsu, but also brings the questioning on international law's colonial logic to the field of epistemology and ontology. In other words, the question I seek to address is not so much that of whether or not the semi-periphery had enough agency to engage with the West, but rather that of the premises of those rules according to which this engagement was structured. It is in that sense that I claim that imperial encounters maintained a constitutive importance for the modern/colonial project. Such encounters helped to define, reconceive and refine the borders and exclusions enforced by the project. They also had a critical importance in revealing the contextual relativity of the legal structure's claim to universality, pointing at the fundamental inequality in its mode of operation vis-à-vis, here, the Orient.

I will substantiate my argument to this effect by looking at three colonial misrecognitions of the Islamic world that served the purpose of the project of modernity/coloniality. The focus of the inquiry will be mostly on Persia/Iran, but I will also draw, to a lesser extent, on the experiences of the other centers of the Islamic world of the early 20th century (Istanbul and Cairo). First, I shall look at the Western perception of the status of Islam and Islamic law as a "traditional", a lesser legal system, followed in a second instance by an inquiry into the West's perception of the economic mismanagement of Persia and usage of international legal documents to rectify the situation. Finally I will analyse Iran's redefinition of its national ideology in the

language and the practices used by the first Pahlavi monarch, and his drifting towards an acceptance of the categories and concepts of the West.

However, before unpacking the arguments, I would like to explicit one caveat, namely that while I do appear in this section to refer to Persia and Iran as a unified Islamic ontology whose cultural taxonomy is mainly Islamic, I do recognize that this land has been marked by numerous cultural realities over the centuries, and that its ontology draws from various taxonomies.¹¹⁴ This is exactly why I refer to the term “Islamicate” when speaking of Persia/Iran and not “Islamic”. My interest with Persia does not lie directly on the (rather unstable) physical delimitation of its geography (the focus that a classic ontic international legal perspective would have) and the succession of political identities it has had over millennia. Rather, what interests me is the phenomena of Islam as a social and normative signifier for societies informed by it, even though they are not entirely reducible to it.¹¹⁵ While I do not want to dismiss criticism as to what might be arguably perceived as an essentialization of Persia/Iran as fundamentally Islamic, I feel that such criticism would miss the point of my project. My focus is rather on the undeniable fact that Islam has over centuries informed the ontology of Persia/Iran as a society, and is, for Muslims in this land, a central normative signifier. Indeed, I think it is quite realistic to argue that since the Safavid dynasty’s conversion to the legalistic Ithna ‘Ashari Shi’i branch, Islam has become highly intertwined with Persian identity, and has become *a* defining feature of a collective ontology tied to the land of Persia.¹¹⁶ As we will see in the following subsections, this normative signifier was negated by the modern/colonial project.

A. Islamic law and capitulations in late Qajar Iran

“There is no nationality for a Muslim except his creed which makes him a member of the Islamic Ummah in the abode of Islam.”

¹¹⁴ For an introductory work on this see; Sandra Mackey, *The Iranians: Persia, Islam, and the soul of a nation, with a new afterword by the author* (New York: Plume Book, 1998).

¹¹⁵ Hodgson, *supra* note 8 at 58.

¹¹⁶ Nikki R Keddie, *Modern Iran: Roots and Results of Revolution* (New Haven: Yale University Press, 2003), ch 1; Nikki R Keddie, *Iran: Religion, Politics, and Society : Collected Essays* (London: F. Cass, 1980), ch 4; Rula Jurdi Abisaab, *Converting Persia: religion and power in the Safavid Empire* (London; New York: I.B. Tauris, 2004); Andrew J Newman, *Safavid Iran: rebirth of a Persian empire* (London; New York; New York: I.B. Tauris; Distributed in the U.S.A. by Palgrave Macmillan, 2006).

Majid Khadduri, one of the most cited scholars of Islamic “international” jurisprudence, claims that it is in fact the secular character of the modern law of nations that has allowed it to become a worldwide standard. Khadduri believes that the mythic commencement of international law with the Peace of Westphalia and its separation from religion is what distinguished it, a modern system of law, from a religious one such as the law of Islam.¹¹⁸ The underlying modernist claim of Khadduri is that a secular legal system is more prone to reflect the needs of the growing religiously and ideologically diverse group of nations. However, I would like to propose that Khadduri simply elides the question of the epistemic roots of the modern legal system, as well as its epistemic and methodological biases. In doing so, Khadduri merely legalizes what I have elsewhere termed the epistemic privilege of modernity¹¹⁹, and replicates the structures of power of the modern/colonial project.

The early modern foundational moment of international law in the thought of the Jesuits and Dominicans, was premised on a subjective understanding of the world, a cosmological view steeped in the narrative of medieval Christianity, and the proto-modern logic of European imperialism. However, the secularizing of the early theories of international law into a natural law framework in the thought of Vitoria, later Suarez, and epitomized by Grotius, led to a shift in focus towards a new “*civitas saecularis*”. The *Respublica Christiana*, dissolving into the *Ius Publicum Europeum*, the Public law of Europe, became under modernity the *Nomos of the Earth*.¹²⁰ Claiming universal applicability, the post-Westphalian *Nomos* was inherently tied to the question of the appropriation of land upon which legal claims have to be based.¹²¹ The foundational criteria of this land appropriation were threefold according to Schmitt; “[the earth] contains law within herself, as a reward of labor; she manifests law upon herself, as fixed boundaries; and she sustains law above herself, as a public sign of order.”¹²² Similar criteria (the

¹¹⁷ Sayyid Qutb, *Milestones*, A.B. al-Mehri, ed. (Birmingham: Maktabah Booksellers and Publishers, 2006) at 103.

¹¹⁸ Majid Khadduri, “Islam and the Modern Law of Nations” (1956) 50:2 *The American Journal of International Law* 358 at 372.

¹¹⁹ Cardinal, *supra* note 30.

¹²⁰ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, translated by G. L. Ulmen (New York: Telos Press, 2003).

¹²¹ *Ibid* at 80.

¹²² *Ibid* at 42.

amelioration of land, edification of borders, and maintenance of a sovereign legal order) can be found in the early theorists, from Grotius to Vattel and Puffendorf.

For Schmitt then, a legal claim that could not be based upon a sufficient relationship to land, following the imperatives of the *Ius Publicum Europaeum*, could not be perceived as a valid legal claim of universal applicability for it lacked the *Nomos of the Earth*. This *Nomos* was a universalization of the particular normative experience of Europe with regards to the occupation of land, an extension of the European criteria for the foundation of law structured around the conception of the state. This is, I claim, exactly where the colonial logic lies; any claim to legality that did not follow the epistemic criteria set by the *Nomos of the Earth* was to be rectified, or civilized, so as to follow the universal normative order of this *Nomos*.

The European state, because of its successes in delinking society from religion and thus ordering European society by limiting the bloody religious wars of Europe, became the central standard for the foundation of this *Nomos of the Earth*.¹²³ States became the model for the institution of a perpetual peace, a universal order that could replace the previous Christian-oriented considerations that led to the bloody 16th and 17th century, marked by the Reformation, and the successive expulsions and exactions against Jews and Muslims of Iberia. This new conception of the foundation of law proposed a form of authority and governance separated from divine structures of power, Hobbes' "Mortal God"¹²⁴, enunciated around the agency and authority of the independent European state, devoid of any religious underpinnings. Secularism, in the episteme of modernity, is then presented as a grand achievement of *Western* social formations, a move away from the age of obscurantism, of tradition, and into Enlightenment. Secularism, while being a contextually specific occurrence, is not presented as such a historical reality, but rather as a fated universal achievement that instates the secular European state as a superior normative ground than that based on transcendent religious narratives, because of their shift from an episteme centered on God to one centred on Man. Man then becomes the driving force of history against the reified forces of static religious law. The modern secular iteration of a

¹²³ *Ibid* at 52.

¹²⁴ Thomas Hobbes, *Leviathan*, C.B. Macpherson ed (London: Penguin Books, 1985) at 227; Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, George Schwab & Tracy B. Strong, eds. (Chicago: University of Chicago Press, 2008).

universal law then instituted its differentiation from its particular religious counterpart, and its necessity in the march of history.

Central to this differentiation however is the importance of the abyssal logic. A radical, absolute and total differentiation was instituted between the secular European state and its Other, that which was still in those days of tradition and obscurantism, ordained under a transcendent religious norm. This absolute Other then constituted the absolute enemy that locates the existence of a foundational *political* divide, which I have discussed previously. Under the modern/colonial project, religiously inspired normative orders and social organizations are then necessarily the second pole of the *political* antagonism, the one that modernity needs to reduce to affirm its ontological universality. This section will explore the ramifications of the secular principle and its place in international law. I will propose that while sovereign powers such as Persia and the Ottoman Empire remained free from formal colonialism, their belonging to the Islamicate world, and their sovereign filiation to a divine authority established them as zones of exception for the application of international law.

Islam, in relation to the field of international law was constitutive of the discipline as it occupied the position of a critical “other” against which a modernist law could be delineated. Early modern international law needed a canon to establish what was law and what was not, and Islam provided the negative background for that purpose. Indeed, the secular value of the Enlightenment, to assert itself as universal, needed a particular Other from which to fabricate its own claim to universal truth. Fabricating Islam’s irrational (thus non-universal) “particular” claim was then an appropriate course of action, one founded in the previous *Respublica Christiana* absolute political enmity, so that Islam could be excluded from the possibility of universalism. This project, necessarily, was not one of negotiation, but rather one of domination. Islamic actors present in the fora of international law did not see their discourses framed in their own episteme, in their own hermeneutical perspective, but rather under the scheme of reference of the dominant European power, that of the avowedly secular state system.

Speaking of the participation of the Ottoman Empire in defining the rules of early and inter-war humanitarian law, Cockayne points out that “Islamic players and Islamic rhetoric

wielded little power or influence within this system”¹²⁵. Explaining the reasons for this sidelining of an Islam-derived state agency in the normative structure of international law, the author recalls the declaration of a French representative in Constantinople writing to the ICRC in 1868 in disagreement to the integration of the Ottomans in the Committee;

“On a, dans toute affaire, à lutter à Constantinople contre une force d’inertie dont rien ne peut donner l’idée; et il faudrait des efforts inouïs pour obtenir la formation sur le papier d’un comité qui ne fonctionnerait jamais et dont les Turcs ne comprendront jamais l’utilité, eux qui ramènent tout à la Providence et n’admettent pas qu’on cherche à se soustraire à ses décrets. Je sais toute la peine que nous avons eue à obtenir de la sorte qu’elle adhérât à la Convention de 1864, à laquelle elle ne comprenait absolument rien; elle a fini par se rendre lorsqu’on lui a expliqué qu’il ne s’agissait que d’apposer sa signature, pour faire comme tout le monde, au bas d’un acte d’accession qu’on lui a présenté et qui ne devait l’engager en rien.”¹²⁶

For this representative, humanitarian law, and more broadly, international law, was out of the grasp of the Ottomans *because* of their religion, the irrationality that lies therein, and what the agent found was an overt and constant reliance on Providence. In other words, Islam, because of its divinely ordered legal (ir)rationality could not provide the means required for the advancement of society in a modern age. Agents of an authority based on Islam could at best be sovereign only insofar as they would use this sovereignty as agency to submit to the principles of international law. The question of the reliance on providence is not what interests me here; I am rather more interested in the unmitigated sidelining of the providential worldview as a possible normative locus.

As I briefly discussed above, the apparition of secularism was concomittant with the treaty of Westphalia and the statist paradigm, which led to an equation of state and secularism as one of the central tenets for a perpetual peace in the *Ius Publicum Europaeum*. While the birth of secularism in Europe was a contingent and timely historical matter, rising from decades of dreadful religious war, the concept was rather elicited by modernity as a necessary stage in the unfolding of a universal human history, which all cultural formations need to achieve if they are

¹²⁵ Cockayne, *supra* note 22 at 602, 611.

¹²⁶ Cited in *Ibid* at 602. Original in Pierre Boissier et al, *Histoire du Comité international de la Croix-Rouge*. (Genève: Institut Henry-Dunant, 1978) at 288.

to progress.¹²⁷ Secularism and the ejection of God from the political is discursively attached to the concept of state, which becomes the representative of national unity, the only unit with political agency as it is the central normative *locus* of the *Nomos of the Earth*. The state is necessarily detached from any divine ethical principles, and rather geared on a rational behaviour-orienting “raison d’état” that leads it towards perpetual peace and an acceptance of the rules of *politics* under the modern *political* project. The rational state then becomes the central epistemic pole of the international legal structure, the only unit through which societies’ behaviour can be analyzed and normalized.¹²⁸

The underlying rationale of the encounter between the modern and its Islamic other then is that secularism is the driving force of scientific and social progress, and that the Islamicate world needs to submit to it in order to progress. Societies that lack secularism are then contrasted with its presence in the West, creating an absolute enmity, an irreconcilable political confrontation attributable to the presence of religion in the face of modern secularism. Modernity’s abyssal thinking equates a religious *nomos* to the backwardness of a society. Secularism entails the claim that religiously defined polities cannot assert the production of knowledge and are thus, in the march of history, stagnant because of the specific and contingent nature of their beliefs. It also asserts that sacred normative narratives cannot sanction ontological claims for they lack the scientific, universal capacity of modernity.¹²⁹ For societies, secularism fulfils modernity’s mystical purpose of the containment of social conflicts and peace, preventing the religious passions of the past from getting out of hand.¹³⁰ But more centrally, secularism is fundamental for modernity because it leaves the space of the political empty from the presence of God, prompting liberalism as the structure of the politics of a society to give effect to a perpetual peace.¹³¹

¹²⁷ Salman Sayyid, *Recalling the Caliphate: Decolonisation and World Order* (London: C. Hurst & Co., 2014) at 35.

¹²⁸ Daniel Chernilo, “The Critique of Methodological Nationalism: Theory and History” (2011) 106:1 Thesis Eleven 98 at 99–100; Ulrich Beck & Natan Sznaider, “Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda” (2010) 61 Brit J Sociol 381 at 3; Anthony Giddens, *The Class Structure of the Advanced Societies*. (London: Hutchinson, 1973) at 265.

¹²⁹ Sayyid, *supra* note 127 at 33.

¹³⁰ *Ibid* at 34.

¹³¹ *Ibid*.

The Ottoman Empire and Persia, both being Islamicate states that were never formally under colonisation, however willingly accepted to grant Europeans a somewhat humiliating system of capitulations providing them with the privilege of non-reciprocal extra-territorial jurisdiction in their territories in order to facilitate trade and diplomatic relations. Starting with Persia's defeat to Russia in 1828, and the ensuing treaty of Peace and Commerce of Turkmanchay¹³² that sealed peaceful relations between the two nations, Persia granted Russian diplomatic representatives, in the peace dispositions, the rights of extraterritorial jurisdiction over Russian nationals in Persia.¹³³ Moreover, the commercial treaty, at article II, established that contracts, bills of exchange and bonds between Russian and Persian subjects were to be registered before both a Russian consul and a Persian *hakem* (governor). Those further legal measures also granted special courts and various commercial privileges to Russians in pursuit of legal matters, going as far as conferring Russian officials jurisdiction over Persian individuals in criminal cases in which they were incriminated.¹³⁴

Consequently, sovereign Persian authorities had no power over Russian-*protected* subjects, except in cases provided for under an agreement. The Turkmanchai model was then extended to other foreign nations, most importantly Great Britain in 1841¹³⁵, and then Belgium, Germany and France, so much so that capitulations were signed with most European powers by the end of the 19th century. Now, while the fairly similar capitulation texts did not provide for the establishment of mixed courts, British and Russians dignitaries forced Persia under political pressure to establish such tribunals at its own costs.¹³⁶ The submission of Persian jurisdiction under capitulations, at the turn of the century, with the legal protections accorded to foreigners and their protected individuals (often including Persian political actors, and in the early 20th century, Mohammad 'Ali Shah Qajar himself after his ouster by the *Majlis* the Iranian

¹³² Jacob C Hurewitz, ed, "Treaty of Peace and Commerce (Turkmanchay): Persia and Russia 22 February 1828" in *Diplomacy in the Near and Middle East; a documentary record* (Princeton: Van Nostrand, 1956).

¹³³ *Ibid*, s 10. of peace dispositions and s. 7 of commercial dispositions.

¹³⁴ *Ibid*, s 8.

¹³⁵ Jacob C Hurewitz, ed, "Treaty of Commerce: The United Kingdom and Persia - 28 October 1841" in *Diplomacy in the Near and Middle East; a documentary record* (Princeton: Van Nostrand, 1956).

¹³⁶ Zvi Yehuda Hershlag, *Introduction to the Modern Economic History of the Middle East*. (Leiden: E.J. Brill, 1964) at 151.

parliament), amounted to relegating Persia to a sort of semi-colonial status in which it did not benefit from the full breadth of its sovereignty.¹³⁷

While capitulations in Persia arguably did not have the same crippling effect for the local administration as they had in the Ottoman Empire (due most probably to the fewer number of foreigners in Persia because of distance and the fact that the Ottomans were Europe's closest Other), in times of crisis or of excessive Persian assertion of sovereign power, the beneficiary powers exerted pressure on Persia, based *inter alia* on the capitulations.¹³⁸ Underlying this dispensation from jurisdiction was the idea that the law of Persia was not appropriate for Europeans who lacked knowledge in it, and were not Muslims. John Westlake, the famous British international legal publicist of the turn of the 20th century, quite the ardent defender of extraterritorial jurisdiction, explains it as follows. Discussing the principle of similarity of civilizations, Westlake establishes a clear divide between the common civilizations of Europe and America on the one side, and on the other, the "Mahometan" people (Muslims), China, Japan and Siam.¹³⁹ In the lands of the former civilisations, "the same avocations and interests are protected by similar laws, civil and criminal, the administration of which is directed by a similar sense of justice" which makes both locals and foreigners "feel themselves safe under the local administration of justice."¹⁴⁰

Now, after this short discussion on the common civilization of the West, Westlake, while recognizing that other states (speaking of Turkey, Persia, Siam, China and Japan) have a civilization of their own, goes on to the question of the equality of those civilizations with the West. Pointing specifically to what he calls the "Mahometan" (Muslim) states, Westlake says that "Europeans or Americans in them form classes apart, and would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection."¹⁴¹ He further proposes that "[t]he case of Turkey must in this part of our subject [the equality of civilisation] be left out of sight, because of

¹³⁷ *Ibid* at 154.

¹³⁸ *Ibid* at 151.

¹³⁹ John Westlake, *Chapters on the Principles of International law* (Cambridge: Cambridge University Press, 1894) at 101–102.

¹⁴⁰ *Ibid* at 101.

¹⁴¹ *Ibid* at 102.

the anomalous position of that empire [...]”¹⁴². In other words, the circumstances and civilizational divide with Turkey are such that it is different enough from the West to warrant a differential treatment, and thus not be bound by the same rules in international law. The publicist then goes on; “[Turkey] may benefit by European international law so far as it can be extended to her without ignoring plain facts, but her admission to that benefit cannot react on the statement of the law, which is what it is because it is the law of the European peoples.”¹⁴³ Therefore law in the lands of Islam had to be supplemented by more universal norms. Capitulations and their extraterritoriality rules were to supplement Islamic law’s lack of objectivity with a secular Eurocentric notion of legal thinking, drawing non-European legal thinking and governance closer to that of Europe, the somewhat higher level of civilisation.

Westlake’s opinions clarify one central point, namely that for him, Europeans make the rules of international law to accommodate themselves in the lands of the Other, of civilizations that are different enough from Europe to require the effect of a differential legal system. The author also clearly suggests that it is, for those states on the periphery of Europe, a “benefit” to be accepted into the system of rules of the laws of Europe. Then again, such benefits can only be extended in due consideration of the “plain facts” that mark the situation in Turkey. In other words, integration of Turkey into the law of (European) nations required differential treatment which, when read contextually in this section of Westlake’s book, has to do notably with the administration of justice in the lands of Muslims states. Europeans and Americans, who share a common civilization that is different from that of Muslims, must be given institutions and norms under which they can feel safe. This section of Westlake’s work largely explains the feeling of foreigners with regards to Islamic law; not only are its substantive norms lacking, but the system in itself lacks in integrity and form. The idea was then that the lacking Islamic legal system of the Ottoman Empire and Persia required a replication of European norms and the establishment of a model of European governance in order to ensure *Europeans’* rights when they lived and traded in those lands.¹⁴⁴ It is notable that the opposite, the rights of Ottomans and Persians in the lands of Europe and America, is never discussed.

¹⁴² *Ibid* at 103.

¹⁴³ *Ibid*.

¹⁴⁴ Anghie, *supra* note 97 at 745–746.

Interestingly, Western thinking limits the traction of Islamic norms and knowledge to that of a socially constructed and thus relative “culture” or “tradition”¹⁴⁵, one of things Orientalism was historically famous, without any conception of a universal Islamic core stemming from revelation in which Muslims believe.¹⁴⁶ Moreover, the category of relative “tradition”, from a Western perception, did seem appropriate to talk of Islam because *shari’ah* law found as one of its central sources complete sets of normative examples found in the specific *tradition* of the Prophet, the *Sunna*. This legal source has, in Islam, a central normative importance for the legal framework, being second only to the Qur’an. However, it has to be kept in mind that such a tradition was never a really rigid set of traditions to be imitated but rather a frame to be reflected upon so as to provide for its evolution by competent jurists¹⁴⁷. It can hardly be argued that there exists one single monolithic Islamic tradition that would fit a strict modernity/tradition divide, while there is in fact one Islam that is always dependent on the dynamic existence of a set of core normative principles revealed in the Qur’an. This points to what Said amongst others argued, namely that Islam, as a “tradition” (versus “modern” science) and not as a legitimate coeval field of scholarship, is a creation of mainly German, French and British scholars, and then of American academia.¹⁴⁸

What is the relevance of such internal legal matters to international law? The system of extra-territorial jurisdiction is quite explicitly one of “exception”, as it provides for an exemption to the local legal system, and thus limits the principle of sovereign authority. The fact that capitulations were specific guarantees demanded of non-European states by European powers, without reciprocity and technically, but not actually premised on an international system of sovereign equality shows that non-European societies were not entirely states. They were rather at a stage of “stateness” that was inferior to that of Europe, while still forming sovereign

¹⁴⁵ On theoretical creation of Islam as such, see Aaron W Hughes, *Situating Islam: The Past and Future of an Academic Discipline* (London: Equinox Pub., 2007), ch 2. See also the great historical review provided by Quinn in Frederick Quinn, *The Sum of all Heresies: The Image of Islam in Western Thought* (Oxford: Oxford University Press, 2008).

¹⁴⁶ Amr G E Sabet, *Islam and the Political: Theory, Governance and International Relations* (London: Pluto Press, 2008) at 176–177.

¹⁴⁷ On this see notably chapters 1 and 2 in Wael B Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001). And more generally Wael B Hallaq, *An Introduction to Islamic law* (Cambridge: Cambridge University Press, 2009); Wael B Hallaq, *The Origins and Evolution of Islamic law* (Cambridge: Cambridge University Press, 2005) at 103–122.

¹⁴⁸ Hughes, *supra* note 145 at 42–48; Said, *supra* note 9, ch 3.

societies. In the language of Westlake, they did not have the commonality of civilization with the civilized states of Europe. In fact, it would appear from this that non-European quasi-states were sovereign only insofar as they replicated the model of the European sovereign. While capitulations were to an extent premised on the necessity to (quite literally) civilise the Other and the idea that a more objective legal system would bring non-modern colonial societies closer to the standards of modernity, this dynamic also unearths the subtleties of informal colonialism.

Underpinning the frameworks of Western thought and international law is a set of assumptions that theoretically relegate the religious phenomena outside of the sphere of cognizance of the modern, as mere myth, as a thing of the past and as an irrational frame of thought incapable of providing what the modern era requires¹⁴⁹ (It is however important to note that international law is substantially grounded in a Christian theology of natural law, described by Schmitt in his political theology)¹⁵⁰. Indeed, “through the western gaze, oriental laws became essentialised, homogenised, exoticised, distanced, contrasted and made to look primitive and backward by the standards of European laws.”¹⁵¹ Against this perception, the Western modern state must be technically devoid of any direct religious filiation, for only its sovereign political power can have authority; it cannot be drawn from a superior divine order, because as European history has shown, such frameworks are prone varying interpretations, and conflict. A legal framework deriving from a divine *nomos* lacks the objectivity of positive law. The modern *nomos* is that derived from the reality of *land*, of a status derived from occupation of land under an order established by the constitutional order of the state. International law can then only be derived from positivism, the practice and will of those states.

An abyss is then instituted between the highly subjective and particular law of the Other, and the objective universal modern law. Politics that were not premised on secularism were relegated to a zone of exception where the Eurocentric principle of the equality of legal subjects, of sovereign authority, could not apply because of those societies’ reliance on backward forms of authority, irreconcilable to the universal European experience. This universal promise of

¹⁴⁹ Sylvia Wynter, “1492: A New World View” in Vera Lawrence Hyatt & Rex M Nettleford, eds, *Race, Discourse, and the Origin of the Americas: A New World View* (Washington: Smithsonian Institution Press, 1995) 5 at 14.

¹⁵⁰ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005).

¹⁵¹ Carol GS Tan, “On Law and Orientalism” (2013) 7:2 *Journal of Comparative Law* 5 at 5–6.

international law is then made dependent on the acceptance of the not so universal premises of European historiography. By this I mean that international law's claim to universality is problematically premised on very specific experience of Europe, as I have argued previously, which critically undermines this claim to universality. In that sense, as I proposed previously, the *political* premise of international law was not negotiated between contending political claims, but imposed through the project of modernity/coloniality. I claim, in the following paragraphs, that this is demonstrated by the politics of secularism conveyed by the Persian concessions. Because Islam is perceived as a questionable normative structure in comparison to modern European law, Islamic polities do not benefit from equal status under the international framework.

This last claim also unearths a dynamic that is even more pernicious, namely the capacity for the European states, in the 19th century, to *decide* that international legal principles would not apply in Persia or the Ottoman Empire and their capacity to enforce this status in international legal documents. In other words, the constitutive and universal promise that underlies the critical instability of the law highlight the relativity of its principles, and most importantly, because of its dynamic self-constitutive side, the epistemic domination that international law can impose on other epistemes that do not fit its "universal". What I am pointing at is the European stranglehold over the definition of international law, as the discipline presents the universalization of the particularity of Europe. "Cultural" disrespect and imperial manipulations have characterized the relationship between Europe and the Islamic world, and this goes through the universal assertion and submission of this Other's epistemic Being to that of the European. Capitulations were instrumental to this, as they served to portray the Islamic legal system as insufficient to benefit from the promise of the modern universal promise (of equality, freedom, etc.) and into accepting European imperatives. More importantly, we start to see emerging international law's critical instability; the religiosity of the world of Islam was the other against which western secular legal principles were defined, and against which international legal imperatives were set. The opposition of secularism and Islam also points at the critical breach in the discipline of international law; fulfilment of some of its foundational principles require that it breaches others – secularism requires that the equality of mankind be set as a relative value.

I would like to emphasize this last point by referring to the Constitutional revolution in Persia. I would submit that legal Orientalism shows its strongest variance in the legal forms instituted by the 1906 *Mashruteh* (constitutional) revolution. Being one of the first states of the Islamic world to change to a constitutional government, the modernizing thrust of the *Mashruteh* movement led Persia to the adoption of a constitution¹⁵² based on the Belgian model. The adoption of a western-based document of this importance in Persia unavoidably led to the adoption of a Western legal system to supplement it, and to the consequent restraints imposed on Islamic law from the fields of public law at the national and international levels (Islamic law not making any difference between those Western categories), relegating Islam to mere private and doctrinal concerns.¹⁵³

For numerous reasons that were not necessarily of a legal nature (including foreign influences), the *Mashruteh* movement failed in establishing a viable democratic modernity in Iran.¹⁵⁴ However, what it did establish was a corpus of laws derived from European juridical traditions. The constitution itself was, as I will show, following decades of jurisdictional evolution under capitulations that perpetuated a two-tiered legal structure that institutionalized the lesser status of Islamic law. My claim is that this led to a total capitulation of Persia to the imperatives of the Western governance model. However, I would add a caveat to this claim by saying that what I propose is not that, substantively, modelling the Persian constitution on the Belgian model was wrong or that the reign of Mozaffar ad-Din Shah was more in tune with Persian cultural taxonomy (which he was not), nor that secularisation was inherently a wrong move. Rather my point is that the fact that Persians referred to a Western legal document to instate the rule of (modern state-based) law in their land, following decades of capitulation and oppressive western meddling in Persian affairs, was a telling instance of the power of the matrix of coloniality on the psyche of the colonized. I would think that there is a possibility to

¹⁵² “Iran’s 1906 Constitution and supplements”, online: *Foundation for Iranian Studies* <<http://fis-iran.org/en/resources/legaldoc/iranconstitution>>.

¹⁵³ Mohammed Bedjaoui, “The Gulf War of 1980-1988 and the Islamic Conception of International law” in Iger F Dekker, Harry H G Post & Nederlands Instituut voor Sociaal en Economisch Recht, eds, *The Gulf War of 1980-1988: The Iran-Iraq War in International Legal Perspective* (Leiden: Martinus Nijhoff Publishers, 1992) p.277 at 295–296.

¹⁵⁴ Ali Mirsepassi, *Intellectual Discourse and the Politics of Modernization: Negotiating Modernity in Iran* (Cambridge: Cambridge University Press, 2000) at 55, 61–63.

“modernize” from a non-Western perspective, and without taking for granted the West as a template for this modernization.

The first constitutional dispositions of 1906 established an electoral and parliamentary system in Iran, based on a bicameral legislature, instituting the National Consultative Assembly, the *Majlis* as well as a senate¹⁵⁵. The *Supplementary Fundamental Laws of 1907*¹⁵⁶ were, overall enacting a charter of rights, entitled the “Rights of the Persian *Nation*”¹⁵⁷ (my emphasis) a concept that was, in its Western liberal acceptance, yet foreign to polities informed by Islam.¹⁵⁸ The document included all the legal modes and technologies of the modern West, and an overall system of governance based on that of European states, and had, as a foundational keystone, one’s right to property. The Iranian nation was also defined in the subsequent articles through its national borders, and was represented by a flag, and established Persia as a nation under the rule of law.¹⁵⁹ The system of governance provided in the constitution is of significant interest to this inquiry. Section 27 of the *Supplementary Laws* had provided the institution of a division of the realm following the three powers existent in the Western world; a legislative, an executive and a judicial. The legislative, as said previously was to be held by a bicameral legislature, the executive would be transferred to the Persian monarch in a form of constitutional monarchy that would extensively limit the Shah’s royal prerogative¹⁶⁰.

However, due to the specific normative nature of Islam as a religion, what is of most interest to this inquiry is the establishment of the judicial power. The *Supplementary Laws* establish clearly that the “Supreme Ministry of Justice and the judicial tribunals are the places officially destined for the redress of public”, opposed to the religious tribunal that have

¹⁵⁵ note 152, s 1.

¹⁵⁶ Hassan Pirnia, Hossein Pirnia & Ismail Mumtaz, “The Supplementary Fundamental Laws of October 7th 1907”, online: *Foundation for Iranian Studies* <<http://fis-iran.org/en/resources/legaldoc/iranconstitution>>.

¹⁵⁷ *Ibid*, ss 8–25.

¹⁵⁸ By saying this, I do not intend to make the claim that documents similar to a “Western” bill of rights did not exist before, for example, the *Magna Carta*, or that lands informed by Islam and their historical equivalent had never seen such documents. Notable examples would be the Code of Hammurabi, the Cylinder of Cyrus, or the Charter (or Constitution) of Medina, all of which textually provide for a set of basic rights. However, my point is to admit that those previous documents are not articulated along the lines of the right to property, sacrosanct central norm of Western bills of rights.

¹⁵⁹ See respectively Pirnia, Pirnia & Mumtaz, *supra* note 156, ss 3, 5, 7.

¹⁶⁰ *Ibid*, s 57.

jurisdiction only under ecclesiastical matters.¹⁶¹ It is clearly stated that political and civil matters are to be judged under the rules and tribunals provided by the Ministry of Justice.¹⁶² Moreover, while it must be stated in all due fairness that articles 1 and 2 of the *Supplementary Laws* did recognize that Islam was the religion of Persia, and that all laws were to be approved by a committee of Shi'i clerics, the underlying meaning of the said measures only reproduced legal Orientalist imperatives. Indeed, the *Supplementary Laws* clearly established that the Islamic legal framework was to remain secondary to the new modern imports; laws adopted by the legislature did not have to be *Islamic*, but rather only had to be “conformable” to Islam¹⁶³. The original normative framework of the legislature was then not derived from Islam. Rather, it resulted from a purely secular vision of the state in which the supervisory role of the clerics was paying mere lip service to the injunction of conformity to Islam, as the central *nomos* under which they acted was not that of Islam, but a modern one. In other words, laws could be un-Islamic, while not being *against* or *contrary* to Islamic law, and still received approbation. What I would submit with regards to those observations is that, following the constitutional revolution, *politics* in Iran shifted to a *political* model that was geared on that of the West. The phenomenon of the *Mashruteh* revolution thus appears to reproduce the biases of Orientalism and the modern/colonial project through legal means, by the subjects of imperial power themselves.

My proposition is then that capitulations, the *Mashruteh* revolution and the framework of secularism that exists in international law substantially affected the *political* field in Iran, and changed its *politics* to fit western imperatives. As I have argued, the Persian capitulations have led to the import in Iran of the Western project of modernity/coloniality through legal Orientalism. The actual *political* capacity of Persia, as a part of the Islamicate a world, a polity informed by Islam, is, to an extent, negated by the requirement of secularism. What I mean by this however is not to propose that the underlying power play followed some sort of conspiracy theory that would propose that the actors of the *Mashruteh* revolution were all westernizing agents on a British and Russian payroll. Rather quite the opposite in fact. As argued by Becker Lorca, states on the semi-periphery, well aware of their positions vis-à-vis states of the European core, sought to appropriate classical Eurocentric legal thought so as to be able to mitigate the

¹⁶¹ *Ibid*, s 71.

¹⁶² *Ibid*, ss 72–73.

¹⁶³ *Ibid*, s 2.

effects of the law, and of imperialism in their lands.¹⁶⁴ Their recognition and integration into the European consort of states would necessarily require their knowledge and ability to adopt and manoeuvre with the law put forward by Europe in its relations with the non-European world. As Becker-Lorca puts it the semi-periphery developed its own “legal consciousness” that would allow it to convey its grievances in the legal language of Europe.

However, it soon became clear that semi-peripheral legal actors were negotiating and mitigating the effects of international law at a disadvantage, not being perceived as equal in terms of sovereignty to their European counterparts, but also being forced to coin their grievances in the language of the *nomos* of modernity. As a parenthesis, Ras Tafari (Haile Selassie) of Ethiopia was quite successful at doing this, speaking both the language of his own *nomos*, but also that of the Europeans’ modern project.¹⁶⁵ The Ethiopian soon realized the limits of international law, and of his own legal consciousness through both the special requirements imposed on Ethiopia for its accession to membership in the League of Nations (which was not the case with most other nations)¹⁶⁶, and for the League’s subsequent inaction in the face of the Italian invasion in 1935-1936¹⁶⁷. From a *nomos* devolved from modernity, elites of the semi-periphery fell into the *political* reality imposed by liberal internationalism, a fact also recognized by Özsü and Becker-Lorca. Liberal internationalism sought to limit political confrontations and to provide for only one set of politics derived from a liberal “consensus” in order to adjudicate conflicts and differences.

In other words, the ontological possibility of a non-liberal political claim was by obliterated by the hegemonic episteme of liberalism through the subjugation of its episteme. Because the knowledge and worldview of the semi-periphery was seen as unequal, its subjecthood in the realm of international law was denied, and by that same effect its capacity to claim a *political* Being. In the words of my inquiry then, because Persia’s *political* capacity is informed by Islam and that the *political* field of international law is occupied by a hegemonic “universal” secular conception of the state, Persia’s ontological (*political*) claim (or in other

¹⁶⁴ Becker Lorca, *supra* note 22 at 41–140.

¹⁶⁵ Rose Parfitt, “Empire des Nègres Blancs: The Hybridity of International Personality and the Abyssinia Crisis of 1935–36” (2011) 24:04 *Leiden Journal of International law* 849; Becker Lorca, *supra* note 22 at 274–280.

¹⁶⁶ Becker Lorca, *supra* note 22 at 278–279.

¹⁶⁷ Parfitt, *supra* note 165.

words its specific nature as a “Becoming”) is negated. Because of this project, Persia’s epistemic capacity is also negated, for no “universal” rational knowledge can come from a standpoint informed by religion. State secularism then becomes, from an international legal perspective, the disciplinary apparatus from which to dominate the Other.

This would mean that the existence of an Islamicate *political* identity (an ontological possibility based in Islamic and not Western terms, representing its locus of enunciation not in the delimited “nation”, but in the wider *Ummah*-wide Islamicate existence) is reduced to a number of specific individual experiences informed by culturally different variations of Islam. This could also mean, as we have seen, that Islam is something towards which you can merely “conform”, as it is an iteration of particular values that do not have the standing of an obligatory normative framework that cannot claim a “universal” *nomos* for its political claim. All such variations of “conformable” frameworks then form, under the epistemic realm of international law, a variety of separate particular nations. Those nations informed by Islam then live under states, a theoretical point that shifts the focus away from and actually dismantles the broader Islamic reality of the *Ummah*, which does not make such distinctions, but only membership into the universal *nomos* of Islam. While the “nation” does not necessarily invalidate claims to religious identity, it does however undermine the possibility for religion to become the central signifier of a people, for there is only “the nation”. What this meant for the Islamicate world is that an Islamic “international”¹⁶⁸, the actual existence of an “Islamicate” through affinities that trespassed Western-defined national boundaries was undermined by the modern/colonial-project. In that sense, international law and the state support each other in constituting their respective categories and in normalizing the imperial and colonial experiences of the Islamicate world.

Legal Orientalism then makes Islamicate experiences, at best, into mere steps on the way to modernization, a past that must be transcended. This process totally circumvents the issue of Islamic political agency by replacing it with the hegemonic Western liberal model. As with capitulations, international law legitimates and helps to implement mechanisms of emulation and

¹⁶⁸ We can find amongst those, for example, Sufi and ‘*ulama* networks, or a belief in the existence of a community of faith in Islam, as provided in the Qur’an “The Noble Qur’an”, online: *The Noble Qur’an - Sahih International Translation* <<http://quran.com/>>, v 49:13.. See Francis Robinson, “The Islamic World: World System to ‘Religious International’” in Abigail Green & Vincent Viaene, eds, *Religious Internationals in the Modern World*, The Palgrave Macmillan Transnational History Series (Palgrave Macmillan UK, 2012) 111.

adaptation to rectify the Otherness of Islamic law, so that it matches as closely as possible the model of Europe. Mechanisms of emulation such as integrated in the self-Orientalising features of capitulations, will serve to universalize the domination of a specific discourse or model, and mechanisms of adaptation will entrench a status quo premised on the inequality of knowledges.¹⁶⁹ Essentially then, international legal mechanisms and technologies such as the capitulations and the institution of a governance model based on statist prototypes have not negotiated the imperial modern/colonial encounter. Rather, it delegitimated the normative existence of the Other, and ontically integrated it in the hegemonic Western discourse, its imperial geographies. The Other was then forced to negotiate with the little agency it had under the epistemic frame provided by the Western narrative of international law.

The secular origins of international law prevent the discipline from recognizing or even consider the possibility for a structure of governance to ground its normative roots, authority and ethics to a self-referential religious system that would be separated from and impervious to Western modern knowledge (despite the theological roots of secularism itself, as a Western project emanating from Christianity).¹⁷⁰ Indeed, this situation shows that international law is in fact deeply affected by the instability of the project of modernity/coloniality, an instability that is both epistemic and ontological due to the gap between the project's universal promise and its actual real effect. In fact then, it is the epistemological and ontological limits of international law, enclosed in the Western experience, that prevent it from actually making any sense of an Islamicate constituency's (legal) agency. The project of modernity/coloniality, by establishing the universality of the Western episteme against all others has dislodged religion from the position of the "necessary value" that it represents to its adherents, to a contingent value, thus falsifying its claim to divine truth.¹⁷¹ A proposition that Islamic thought is a mere human matter that does not have its place in the *political* realm of the state undermines Islam's own self-referential claim to legitimacy, and draws it closer to what it means *for the modern* and not *for itself*.

Islam is denied the possibility to participate in the political debate, for it does not meet the required (epistemic and ontological) criteria. By doing so legal Orientalism invalidates the

¹⁶⁹ William L Cleveland, *A History of the Modern Middle East* (Boulder: Westview Press, 2004), vol 2.

¹⁷⁰ *Ibid* at 179.

¹⁷¹ Hodgson, *supra* note 8 at 57.

subjective setup of Islamic epistemology, and deprives it of its cognitive structures of thought, facilitating its domination and exploitation.¹⁷² An Islamicate polity would then have to be subsumed under the rules of international law in order to receive international agency, and would have to relinquish its religious legitimations and rather seek the apparatuses of institutional governance favoured under the schemes of international law. Özsü, speaking of this process in semi-peripheral states, notes that the elites of those societies were well aware that they had to adapt to and rely on Western international law to benefit from sovereign equality, for otherwise, they would only be demoted to the status of “semi-civilized”.¹⁷³ International law and its Eurocentric models were then geared on producing a hegemonic epistemic matrix on which the rest of the world was to model itself, or face interventions and sanctions provided by the legal structure.

When secularism breaks the link between Muslims and their religious ontological possibility by making Islam a “particular” issue, it breaks the possibility for Muslims to affirm their temporal political agency as defined by a normative claim that relies on a non-temporal ontological existence in religion. This necessarily leaves Muslims, in the above context, with only the limited possibility of politics sanctioned by a Western episteme and ontology to value their claims and grievances. The dramatic phenomenon here is that the Muslim, because he lives according to Islam as a way of life and normative framework, thus Islam as a *nomos*, is “torn between exclusion as something radically different to the West and the demand to join and become the same as it”.¹⁷⁴ Then, while not being under direct physical colonization, the Muslim faces the effects of colonization, and the coloniality of Being as described by Fanon and Maldonado-Torres¹⁷⁵.

I therefore argue that the inclusion of the Islamic world into the modern community of nations amounted to the subjugation of Islamicate authorities to the principles of European law, governance and political theory. The Islamicate world was reduced to its non-political “bare life”, limited to accept surrender through the mere adherence to and imitation of international legal

¹⁷² Sabet, *supra* note 146 at 187–188; Niklas Luhmann, *Essays on Self-Reference* (New York: Columbia University Press, 1990) at 230.

¹⁷³ Özsü, *supra* note 33 at 249.

¹⁷⁴ Eve Darian-Smith & Peter Fitzpatrick, *Laws of the Postcolonial* (University of Michigan Press, 1999) at 2.

¹⁷⁵ Fanon, *supra* note 83; Maldonado-Torres, *supra* note 29.

documents steeped in legal Orientalism that limit their jurisdictional capacities and their sovereign power. In the following sub-sections I will explore further how this dramatic phenomenon unfolded in Iran, how Persia was depoliticized, and its political agency, the capacity for Persians to Be for themselves and not for others in their own taxonomy (or hermeneutical scheme), was undermined by the technologies of international law. I will look at how foreign modernization in Persia reproduced the above phenomena, leading to a feeling of self-Orientalism in Persian society. I will argue that this feeling further entrenched modernization schemes, culminating in the assertion of national (state) identity (in section C). I will look at how clearly this modernization sought to limit the political role played by an Islamic cultural taxonomy in Persia.¹⁷⁶

B. Concessions, economic impasse and the bourgeoisie

“[The West is] an entity that, seeing us as an inferior society, has exerted its best efforts to encompass our destruction.”

- Mustafa Kemal Atatürk to an interviewer in 1923¹⁷⁷

After the undermining of Persian jurisdictional capacities through capitulations given to European powers, Persia's status as a backward polity was arguably inset in the principles of international law that governed its relations with foreign forces. While the capitulations cannot by themselves irrevocably assert that it was Persia's Islamic affiliation that was at odds with foreigners (while I do submit that it gives substantial proof as to the critical constitutive position of Islam with regard to western modern imperatives), such international means established a differentiated status between Persia and foreign powers. I propose that simultaneous events such as commercial and economic concessions, and the modernization and nationalization projects can probably help in attesting this point. My claim is that the internalization of self-Orientalism in the self-agency of Persian subjects through the expansion by legal means of Western capitalism further delegitimated the possibilities reliant on their Islamic-informed ontology.

¹⁷⁶ Kingshuk Chatterjee, “Shari‘ati and the (Elusive) Quest for a Just Order” (2014) 21:1 The International Journal of Humanities 23 at 27.

¹⁷⁷ M Şükrü Hanioğlu, *Atatürk: An Intellectual Biography* (Princeton: Princeton University Press, 2011) at 57.

With the wars lost to Russia (Golestan (1804) and Turkmanchay (1828)) and Great Britain (Anglo-Persian war of 1856 that led to the cession of Herat and thus Afghanistan to the British forces) and the ensuing capitulations (etymologically, “to agree on specified terms”, and “to make terms of surrender”), Persian elites, I claim, started to internalize their country’s status as a peripheral and semi-colonized “sovereign”. It was not long before Persians, in a sort of self-loathing act of Orientalism blamed themselves, their cultural taxonomy, their identity and their ways of comprehending the world for their ills, especially when they felt the, more often than not military, power of “modern” Western nations. This behavioural trait, I claim, is related to Fanon’s claim that, under colonialism, “the black man wants to be white”¹⁷⁸ in order to free himself from his wretchedness.

Knowing far too well that they were operating in an international order of very unequal distribution of legal authority and extra-legal power, Persian rulers soon implemented a policy of necessary balancing of foreign interests in the country. Persia gave relatively equal concessions to foreign powers, and did so across the board, in a hope that they would reap benefits from the management of their resources and industries by the West. Such a policy necessarily had to speak the language of the colonizers, which was that of international law with all the ideological background it entails such as in the case of capitulations. This sub-section will aim to express how this structure was made visible in the elaboration of an extensive system of concessions in Persia, and especially in the development of a modern agency inside Persia that gave voice to the modern/colonial project and its international legal narrative. My claim is not that Persia lacked any sort of agency to negotiate the Western onslaught. Rather I claim that this agency existed, more or less, in the alienation of its sovereign rights to its resources, an alienation that was inherently tied to its Persian perceptions of their own wretchedness and incapacity. Then, the limits of agency would be, hypothetically, the structure provided by international law, as a political consensus to “become” a civilized, sovereign state; somewhat of a necessary state in the long march towards sovereign autonomy.

The system of capitulations we saw in the previous section was combined with very generous, often one-sided commercial privileges given, without surprise, to the imperial powers

¹⁷⁸ Fanon, *supra* note 83 at 31.

(preferential tariffs appeared to be reciprocal however, if we take the British and Russian examples). The Turkmanchai treaty for example, in its commercial dispositions, gives preferential taxation and customs tariffs to Russian entrepreneurs (5% less than to other nations).¹⁷⁹ Generally speaking, this was the standard later extended to most great powers; most-favoured nation status and a uniform maximum 5% customs duty on imports (plus extraterritorial rights and legal privileges to foreign enterprises). Moreover, foreign companies, through agreements with the Persian state, were also a force to reckon with. The Russians were given monopoly over most large construction projects in the country. Through the Russian Transport and Insurance Company (TIC) incorporated in Persia in 1890, Russia ensured its total monopoly over Persian infrastructural constructions, from roads and railroads to Caspian seaports.¹⁸⁰ Now, with such a concession giving it control over construction contracts, and virtually over the whole of the region of Khorasan¹⁸¹, Russia was able to push the Persian government to “modernize” its infrastructures. This meant that it was to give numerous contracts to the imperial power to build roads and railroads in a country that did not see a need for it, and could hardly “absorb” it.

One of the central ideological legitimations of late 19th century European imperial expansion, as theorised by Kautsky and Hobson’s “accumulation theory”, or more recently, Wallerstein, was liberalism and a humanitarian notion of “civilization”.¹⁸² This system was premised on a notion of freedom of commerce and communication that went as far back as Vittoria and Grotius’ early modern *jus gentium*. Under classical liberal theory, because freedom of commerce “necessarily” and objectively leads to an improvement of the situation of society, it is to be favoured and enforced because it is rational. This principle was central in early 20th century international law’s “solidarism” theory, which called for a closer interaction between nations and the intensification of trade.¹⁸³ It is then no surprise that, at the heyday of 19th century positivist international law, concessions were a common international legal technology to open

¹⁷⁹ Hurewitz, *supra* note 132, s 6; Hershlag, *supra* note 136 at 151.

¹⁸⁰ Hershlag, *supra* note 136 at 152.

¹⁸¹ George N Curzon of Kedleston, *Russia in Central Asia in 1889: and the Anglo-Russian question* (London: Longmans, Green, and Co., 1889) at 287.

¹⁸² John A Hobson, *Imperialism, a Study*. (Ann Arbor: University of Michigan Press, 1965); Karl Kautsky, *Ultra-imperialism* (Marlborough: Adam Matthew Digital, 2007); Rosa Luxemburg, *The Accumulation of Capital* (London: Routledge, 2003); Immanuel Maurice Wallerstein, ed, *World Inequality: Origins and Perspectives on the World System* (Montreal: Black Rose Books, 1975).

¹⁸³ Georges Scelle, *Précis de droit des gens; principes et systématique*, (Paris: Librairie du Recueil Sirey, 1932); Albert de Lapradelle, “La question chinoise” (1901) 8 *Revue générale de droit international public* at 327.

up the frontiers and accelerate the pace of recalcitrant sovereigns to participate in the international system of trade. To put it bluntly, it was a universal right of all to have access to the resources of others. Arguably then, concessions and subsequent contracts given to Russia for the development of Persian infrastructure had as an objective the extension of the participation of Persia in the global regime of trade liberalization.

Rationally, concessions were then to the benefit of all, as every state was to benefit from freedom of trade. However, the barely industrialized agrarian Persian society, economically centred around the class of *bazaari* traders and well protected by tariff barriers, could hardly compete commercially with Russia at the peak of its industrial revolution.¹⁸⁴ It is hardly arguable that Russia's imperial might, in using a legal technology such as concessions, was driven strictly by humanitarian considerations towards Persia. In fact, while the construction contracts had as an avowed objective the modernization of Persia by the construction of the Trans-Persian railway, linking it to Russia's trans-Caucasian, it linked Russia directly to the enormous market of the Indian subcontinent. Moreover, Russia's control over Persia's communicative infrastructure gave the imperial power substantial leverage in Iran, leading it to demand another concession for the collection of Persian customs duties.¹⁸⁵

Due to Russia's control over trade, a British entrepreneur, Major Talbot, negotiated the total cession of rights for the acquisition, manufacture, marketing and export of tobacco in Persia, a *de facto* monopoly, in exchange for the payment of a yearly set amount of 15000 pounds and a share in the profits of the venture. British interest was tied to the high quality of Persian tobacco, and the system ensured that British interests would be the central concern the second tobacco was harvested.¹⁸⁶ The British, through this concession, inserted themselves between the classes that traditionally led the tobacco trade, forced cultivators to get permits from the monopoly company, and replaced the *bazaaris* for whom tobacco was a great source of revenues.¹⁸⁷ Due to this

¹⁸⁴ Mansoor Moaddel, "Shi'i Political Discourse and Class Mobilization in the Tobacco Movement of 1890-1892" (1992) 7:3 Sociological Forum 447; Bahman Nirumand, *Iran: The New Imperialism in Action* (New York: Monthly Review Press, 1969) at 22.

¹⁸⁵ Bizhan Jazani, *Capitalism and Revolution in Iran: Selected Writings of Bizhan Jazani* (London: Zed Press, 1980) at 4.

¹⁸⁶ Roy P Mottahedeh, *The Mantle of the Prophet: Religion and Politics in Iran* (New York: Simon and Schuster, 1985) at 215.

¹⁸⁷ Moaddel, *supra* note 184 at 459.

monopolistic control of Great Britain over this important section of the Persian economy, Russia protested to the Persian king, arguing that this concession contravened the principle of freedom of trade in the region, stipulated in the treaty of Turkmanchai.¹⁸⁸

Persia then found itself in turmoil, facing on one side the legal assaults of two contending imperial powers, whose legal technologies entrapped its sovereign power, and on the other side, mass social protest organized around the *bazaaris* and *'ulama* (clerics), who had interest in tobacco farming due to the extent of farmlands held in *waqf* (a religious trust)¹⁸⁹, all opposing the British concession. Following Ayatollah Shirazi's *fatwa*, calling for the Persian population to boycott of the use of tobacco, the Shah was forced to cancel the concession in 1892. The international cession contract provided that Persia, in case of cancellation or other inability to fulfil its obligations, would pay a hefty compensation sum. After the revocation, Nasr al-Din Shah did not have the money and was forced to contract a loan with the foreign powers¹⁹⁰, which leads us to the next step in the scheme of concessions of modernity/coloniality.

Some of the most important concessions, in terms of internal and foreign politics, were probably the banking concessions given by the Nasir al-Din Shah Qajar to both Russia and Great Britain. In 1872, Nasir al-Din granted the "Reuter Concession" to Baron Julius de Reuter, a British banker and entrepreneur. The concession gave de Reuter full control of Persian roads, telegraphs, mills, factories, extraction of resources and other public works in exchange for a modest sum and a share of the profits of the enterprises. Lord Curzon, a British imperialist, governor of India at the turn of the century, commented on the concession that it was the most complete grant ever made of control of resources by a foreigner.¹⁹¹ The concession in effect gave to a British entrepreneur enforceable control over the shipping of goods inside and outside of Iran, a privilege that infuriated the Russians as much as the local Muslim population and even the British government, who thought the move to be too bold to be justifiable and tenable internationally.

¹⁸⁸ Nikki R Keddie, *Religion and Rebellion in Iran: The Tobacco Protest of 1891-1892* (London: Cass, 1966) at 43.

¹⁸⁹ *Ibid* at 65.

¹⁹⁰ W Morgan Shuster, *The strangling of Persia: A Personal Narrative* (Washington D.C.: Mage Publishers, 2006) at xvii; Keddie, *supra* note 188 at 125.

¹⁹¹ George N Curzon of Kedleston, *Persia and the Persian question*. (New York: Barnes & Noble, 1966) at 480.

The concession also gave Reuter control over banking in Iran for 60 years, and while the Shah, due to intense pressure from Russia, cancelled the original concession the following year under imperial pressures, there was a second Reuter concession. The second concession, again granted to de Reuter, gave him exclusive mining rights (except on gold, silver and gemstones) and sought to rectify and modernize Persian finances by instituting the Imperial Bank of Persia (IBP) in 1885. The concession was later extended in 1889, instituting the IBP as the state bank and bank of issue of Persia, establishing a *de facto* monopoly of British enterprises over the Persian banking sector.¹⁹² However, the original monopoly did not last for long as the Russians could not let a British citizen hold so much power over Persian finances. The Russians had been given concession for the creation of a bank in 1874, and the Banque d'Escompte de Perse, a branch of the Russian Imperial Bank, was established in 1891, with limited issuing powers.

In the end however, the reason for the existence of both banks was clearly political, as exemplified by the Bolshevik's closing of the Banque d'escompte after the Russian revolution, and the quick collapse of the British Imperial Bank after the creation of the Iranian Bank Melli. In other words, both the Imperial Bank and the Banque d'Escompte, from all perspectives, constituted tools of British and Russian imperialism in the country¹⁹³, more concerned with a specific imperial project than actual Persian finances. Both banks were given effect through the very specific and well accepted international legal technologies that were the concessions. The effect, in other words, was the total robbing from Persian authorities of their sovereign rights over their financial and banking sectors.

The IBP was the central vector providing British loans to the Shah, during the last decade of the Qajar dynasty (190000 and 100000 in 1904 and 1905)¹⁹⁴. Similarly, the Russian Banque d'Escompte was also instrumental in bailing out the depleting finances of the Persian kingdom, injecting 22.5, 10 and 6 million rubbles, respectively in 1900, 1902 and 1910.¹⁹⁵ More importantly however, through those loans, the Tsar was able to ensure his control over Persian

¹⁹² Frances Bostock, "State Bank or Agent of Empire? The Imperial Bank of Persia's Loan Policy 1920-23" (1989) 27 *Iran* 103; Geoffrey Jones, "The Imperial Bank of Iran and Iranian Economic Development" (1987) 16 *Business and Economic History* 69; Hershlag, *supra* note 136 at 151–152.

¹⁹³ Firuz Kazemzadeh, *Russia and Britain in Persia: Imperial Ambitions in Qajar Iran* (London: I.B.Tauris, 2013), chs 2, 3.

¹⁹⁴ Hershlag, *supra* note 136 at 153.

¹⁹⁵ *Ibid.*

custom duties, and the loans also ensured that Russia's counsel and approval were sought before Persia could contract further loans elsewhere.¹⁹⁶ Moreover, it is striking that an important actor such as the IBP had its legal centre in London, and was subjected to British law even while conducting its activities in Tehran. This fact is quite significant as to the actual purpose of the bank. In that sense, while the avowed purpose of the two banking and other commercial concessions were the rectification and modernization of Persian finances and industry, the banks and other imperial entrepreneurial ventures we saw above attained in Persia a level of quasi-sovereignty. While it is certainly arguable that the international legal documents giving effect to this dynamic were valid, in other words that Persia agreed to cede its rights, the motive and the project behind the document is ambiguous. If concessions were not for the best interest of Persia, but for imperial considerations, what is the underlying rationale of the legal technologies used?

As to this, Jones is clear that British perceptions were that such a status for British ventures was necessary because Qajar Persia was "one of the most backward countries in the world".¹⁹⁷ I would submit that, much in the same way as the capitulations were vectors for the expansion of the field of the project of modernity/coloniality, concessions as imperial legal technologies also served to maintain Persia's submission, and to convey, through this domination and technologies, Orientalism's underlying rationale that Persia was backwards *because* it was Persian, and not modern. The idea that Persian finances and industry needed Western banks and entrepreneurs, while being an important vector of imperialism, was also one for the transmission of the Weberian ethics that conceived the Oriental as lesser prone to the universal economic rationality of the European Ego, the *homo economicus*.¹⁹⁸ Indeed, Weber is clear in his early 20th century study that Islam does not have any sort of economic rationality because of its traditional "sultanist" mindset¹⁹⁹, requiring external help from the industrious capitalist people of Northern Europe.

This dynamic between Persia and foreign powers, arbitrated by commercial and banking international legal documents led to a foreseeable, but very interesting turn of events. Through

¹⁹⁶ *Ibid.*

¹⁹⁷ Jones, *supra* note 192 at 69.

¹⁹⁸ Max Weber, *The Protestant Ethic and the Spirit of Capitalism*. (New York: Scribner, 1958).

¹⁹⁹ Bryan S Turner, "Islam, Capitalism and the Weber Theses" (2010) 61 *The British Journal of Sociology* 147; Bryan S Turner, "Revisiting Weber and Islam" (2010) 61 *The British Journal of Sociology* 161.

commercial relations with the West, and the extension of the system of property rights with the import of Western banking and insurance law through foreign corporations²⁰⁰, Persia saw the unprecedented growth of a commercial bourgeois class. It is the establishment of capital securities, which originally served for the expansion of foreign capital assets in Persia that extended the social and political structures of the West in the country. Born from the small elite that benefitted from the import and sale of Western industrial goods made possible by the freedom of trade implemented through the concessions, this new section of Iranian society was to “modernize” itself by studying abroad and making ties with foreign industrial interests, acting as their vector in Persia and later Iran.²⁰¹ This new bourgeoisie was one of the central focal points of modernization in Iran, and they constituted this class of Western-minded and trained modernists and intellectuals that was the keystone of the early 20th century *Mashruteh* movement, the constitutional revolution.

In awe of marvels of European modernity, however, this new class saw as its main obstacle the existent Iranian “feudalist superstructure”, influenced by its religious tradition. This feudalist bedrock of Persian society then had to be superseded by a new modern Western superstructure that would provide the institutions and legal apparatus required for the development of Iran.²⁰² Arguably, the experience that the bourgeoisie had in its commercial and educational dealings with Europe made them realize Persia’s backwardness, and of its own failure. Indeed, what they were exposed to through European thought was the idea that Europeans were able, through modern rationality, to attain the military, intellectual and social might they had now achieved. Persian modernists developed a self-aversion of their own Being, their own cultures, ways of seeing the world and of organizing socially, much like Fanon’s black slave feels in the face of the white colonial master.²⁰³ Colonial subjects were then fundamentally affected into desiring the totalizing model of the colonizer, for the stereotyped images and geographies it produced of itself gave the impression of the actual truth and universality of its structures of thought and categories, because Europe was stronger and better off than the colonial world. Then, theoretically, colonized people, feeling their identity as Black, Chinese or Muslim to be trapped

²⁰⁰ Jazani, *supra* note 185 at 5.

²⁰¹ *Ibid.*

²⁰² *Ibid* at 2–5.

²⁰³ Fanon, *supra* note 83.

in “tradition” and backwardness, would fall into a self-loathing of their ways of Being in the world, resulting in a sharp fall towards the (European) modes of Being favoured by the modern project, despising their own Self.

This class, through the expansion of its capital and its capacity to articulate a claim to power against the comprador regime of the Qajars, as instrumental in the development of a national sentiment in Iran, which the following section will address. The central role of this bourgeoisie in the scheme of the project of modernity/coloniality had to do with its concern for the deployment of Western categories in Iran; property rights, the establishment of capital securities to protect their newly acquired proto-industrial assets, and the role they played in the constitutional revolution.²⁰⁴ Moreover, the new bourgeoisie saw in the tools of the Western nation state the means to keep at bay the ever-encroaching imperial powers, their banks and companies. This new bourgeoisie then entertained a very unstable and ambivalent relationship with foreign powers; while it sought to keep foreigners away from monopolistic control of areas of the Persian economy, it also constantly sought the technical and conceptual help of the West. Any sort of conspiracy theory that would propose that Persian modernists were agents of the West would be rather inconspicuous and simplistic. I think that the relationship of domination delves deeper; modernists after having felt the might of the West, changed their ways of thinking not to appropriate, but to fit a Western model, and to phrase their own grievances in that language provided by the West, that of international law. This is somewhat similar to the “semi-peripheral legal consciousness” that the jurists from the semi-periphery developed in Becker-Lorca’s analysis²⁰⁵, but I claim that this “appropriation” of classical legal literature was a rather shallow form of agency in that it seeks to fit two different worldview in the way that one is made to fit into another. One of the epistemes and ontology then faces the violence of being reduced to what the other is able to cognize.

This ambivalent relationship towards the West led to *negotiate* power through the constitutional revolution, a *political* move, but not to totally *seize* this power, especially towards foreign imperialists. What I mean by that is that constitutionalism, under a veneer of sovereign

²⁰⁴ Jazani, *supra* note 185 at 5.

²⁰⁵ Becker Lorca, *supra* note 22 at 41–75.

independence and liberation from monarchical rule, played the agenda of the west in that it reduced the specificity of Persia to concepts and ways of Being imported from the West. The inability (or unwillingness) of the bourgeois class to face the reality of imperialism, and the real fact that foreign powers maintained control in Persia *because* of the categories and concepts modernists so willingly relied upon constitutes its central mistake that led to the actual real materialist implications of Western imperialism. As Jazani has rightly demonstrated, it is the bourgeoisie's weakness in securing only its own interests (through the establishment of property rights and stable negotiated relations) with the foreign powers, which would perpetuate the concessions and capitulations, that made the whole bourgeois project fail in achieving its own modernization goals.²⁰⁶ In accepting the constitutional compromise based on the establishment of a Western system of property rights, it forgot that this system was premised on the import of Western law that also and more importantly served the monopolistic interests of foreign companies and banks. In other words, the new system that was imported by the revolution was based on the interests of foreign imperial powers and their local agents.²⁰⁷

This pre-eminence of imperial banks and companies in Persia is not without recalling Grovogui's proposition that international law established, in the colonization of Africa, a structure articulated on three levels of sovereignty (sovereigns, quasi-sovereigns and Africans), an arrangement that voiced racial supremacist ambivalences and led to the political annihilation and economic servitude of African powers.²⁰⁸ Indeed, under Anglo-Russian power struggles, Persians were relegated to an inferior status, having to face the vagaries of great power struggles over the control of their resources, and necessarily, the vagaries of foreign corporations that were either exploiting resources, dominating trade or "modernizing" Persia. As stalwartly argued by Grovogui, the structure of international law provided quasi-sovereign authority over non-European people to private European agents through a set of international legal instruments that involved dealings between colonial settlers, imperial powers and commercial companies on the one side, and local authorities perceived as being barely sovereign.²⁰⁹ I would not say that local

²⁰⁶ Jazani, *supra* note 185 at 6.

²⁰⁷ Nirumand, *supra* note 184 at 23.

²⁰⁸ Grovogui, *supra* note 95.

²⁰⁹ *Ibid* at 68; Gathii, *supra* note 20 at 200.

authorities of the colonial people were totally devoid of sovereign power, for they were in fact given just enough authority to alienate their own rights, but no more.

Now I would like to return to the question of the “self-orientalization” that was brought about by the technologies that were the concessions, and the ensuing stranglehold imposed on the Persian economy, and came to an unraveling in the constitutional movement. Following the constitutional revolution discussed in the previous section, Persian modernists were faced with the necessity to stabilize Persian finances, undo what was done by the Qajars, and struggle with the repayment of loans in order to honour the concessions. To undertake such a task, the *Majlis* and the new democratic government of Persia invited and appointed in 1911 Morgan Shuster, an American economist, to become the Treasurer-General of Persia and to rectify the country’s finances. Shuster transcribed in his journal his experience in Persia, and what he perceived as a corrupted and disconnected elite’s all-out sale of their country to foreign powers, highlighting that the problem was not centrally one of the irrationality of the Oriental.²¹⁰ He concluded from his experience that the extensive layers of international loans, contracts and investments that the Russian and British governments had pushed on Persia, had only served the purposes of the imperialists. Notably, the effect was “the permanent and complete crippling and mortgaging of all Persia’s financial resources”²¹¹, and the total submission of Persia to imperial *political* interests. If Persia was to go bankrupt, Shuster recalls, foreign powers would be quick to provide more financial help and to extort more political, juridical and commercial concessions from the Shah.

In fact, Persia, as a new addition to the group of (European) nations was, to the imperial powers, of no importance, and thus of a lesser status than that of the imperial states themselves. The two *Blue Books on the Correspondence respecting the Affairs of Persia* established that Britain was more concerned with not encroaching on official Russian sovereignty, than with respecting that of Persia, leading to proxy clashes between the two Empires over Persian affairs.²¹² In fact, correspondences appeared to hint at the fact that imperial companies and entrepreneurs in the country had more sovereign power and manoeuvrability than the actual Persian government itself, which in fact amounts to the establishment of an “Anglo-Russian

²¹⁰ Shuster, *supra* note 190.

²¹¹ *Ibid* at 326.

²¹² *Ibid* at 331.

condominium in Persia”²¹³ (emphasis in original). However, Shuster’s meddling in diplomatic and legal affairs had him discharged not even a year after his appointment, under Russian and British pressures.²¹⁴

Shuster, while vehemently criticizing European interference over independent Muslims states, insinuates that the central problem that allowed for European interference in Persia, echoing his contemporary Max Weber, was religion.²¹⁵ His insinuations entailed that Persian institutions, not necessarily the irrationality of the Persian individual, were a thing of the past, and that they were on the right path “to imitate both our commercial systems and our political institutions”²¹⁶. What is striking in Shuster’s discourse on Persia is that, while he recognizes the negative effects of foreign interference in the country, he also links the backwardness of Persia to facing this challenge to its outdated institutions and socio-political culture, which he appears to essentialize in Islam. Recalling the previous discussion on Orientalism, this dichotomy limits the understanding of Persia and its ills to the framework provided by the modern/colonial project.

Without actually critically observing the effects of modernization on the country and the links between monarchic despotism, modernization and foreign interference, it lays the blame on what made Persia “different”, from a European perspective, its lack of modern secular rational institutions, for in religion lies the irrationality that prevents Persia from attaining actual economic rationality. Foretelling what was going to happen half a century later with the discourse of development, Shuster thought that only more modernization projects, and a development of Persian culture and “ethical codes” under the supervision of westerners would reap benefits for Persia.²¹⁷ Central to this perspective then is the perception that Persia lacked the law and the institutions that could have given it a proper international standing. Underlying this rationale is the idea that international legal interaction with Persia did create it as somewhat of a “subject”, but only as a non-subject. Indeed, the purpose of a legal ideology is to create subjectivity so as to

²¹³ *Ibid* at 332.

²¹⁴ Hershlag, *supra* note 136 at 154.

²¹⁵ Hershlag confirms this general sentiment. Hershlag, *supra* note 136 at 156–157.

²¹⁶ Shuster, *supra* note 190 at 332–334.

²¹⁷ *Ibid* at 333.

circumvent political debates between two actors within its limits.²¹⁸ And the process in Persia sought exactly to do that, namely to re-inscribe “subjects” (against non-subjects) into the established consensus of legal modernity and liberal economic rationality. The non-subject was one who did not fit into that paradigm, and thus needed rectification to become what it was not; a subject.

Western representation of Islam, Islamic law and what it meant to be a Muslim, in the final analysis, could not amount to legal subjectivity and was prohibited from participating in the political process of defining subjectivity. Necessarily, the other side of this lack was the idea that the West, the British, Russians or Americans, did have the required institutions and law, consecrated in the state form, their modern systems of property rights and the international law of nations, and were to rectify the situation. This project normalizes the superiority of the European over the Persian, or the Muslim, hiding from sight the fundamental political act that was at the origin of the system and that led to the domination of one over the other. In that sense, the European remains the sovereign theoretical subject of all histories, including the ones of the Other, whether this Other is Persian, Muslim or Chinese for all those histories are premised and gauged on that of Europe’s modern matrix of power.²¹⁹ In other words, this scheme enforces the idea that the “traditional” does not see himself as his own Self anymore, but as a “traditional”, a remnant of feudal Oriental despotism that needs to seek his own redemption in the means offered by the course of History incarnated in the West.

On that note, Lord Curzon, British Governor of India, in passing through Persia was clear that British interference in the land of the Shah was made to impress on “the native mind the prestige of a great and wealthy Power”²²⁰, and rectify their oriental character exalted under the mismanagement of “Asiatics”²²¹. It is often thought that the recognition of formal equality is characteristic of the rationality and superiority of modern international law, constituting a departure from mutually exclusive claims to universality in other inter-societal normative

²¹⁸ Louis Althusser, *Lenin and philosophy, and other essays*, translated by Ben Brewster (New York: Monthly Review Press, 2001) at 115.

²¹⁹ Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000) at 27.

²²⁰ Curzon of Kedleston, *supra* note 191 at 172.

²²¹ *Ibid* at 630, 632.

claims.²²² However, this section has highlighted that, in the operation of international law, its formal universal principles had a “darker side” that established zones as less sovereign than others. While my contention does not deal with the actual reality of claims about the feudalism of the Persian aristocracy, I claim that the impact of the international legal technologies of the imperialist powers did reproduce such prejudiced ideas in order to constrain and also develop Persian authority. As the above declaration by Lord Curzon clearly establishes, the often repeated declaration found in the first article of the Anglo-Persian Agreement of August 9th 1919 (elaborated by the same Lord Curzon), namely that the Great Powers “reiterate, in the most categorical manner, the undertaking [...] to respect absolutely the independence and integrity of Persia”²²³, paid merely lip service to the actual reality in Persia. What I mean by this goes back to my previous statement. Indeed, this façade of an objective sovereign equality portrayed by the artefacts of international law highlights how its reality and its word are totally disjoined, straining the stability of the categories of the discipline itself, limiting its legitimacy as a normative system.²²⁴ The fact that the avowedly equal actors of international law are in practice not equal in independence and integrity, notwithstanding what the word of treaties say, robs the category of sovereignty of its legitimacy and meaning in international law, and destabilizes the whole edifice.

First, in the case of Persia, both systems of capitulations and concessions did establish the land of the Qajar rulers as a subject of international law, thus reinforcing its claim to universality. Second, international law also placed this new sovereign outside the domain of regular application of Western international law, because of its difference and irrationality, thus ascertaining international law’s Western origins and structure. Indeed, the condition in classical international law for the signing of a treaty requires that the signatory authorities be at least minimally sovereign for the document to have international legal effect. This requires that, for the demonstration of international law’s actual universality, the imperial powers go to certain lengths to legitimize their imperial actions under the principles of international law. In other words, the establishment of a relatively stable legal relationship between polities required that those taking

²²² For a claim to this effect that proposes an Orientalized view of Islam see; Ebrahim Afsah, “Contested Universalities of International law. Islam’s Struggle with Modernity” (2008) 10:2 *Journal of the History of International law* 259.

²²³ Jacob C Hurewitz, ed, “Agreements: Great Britain and Persia - 9 August 1919” in *The Middle East and North Africa in world politics: a documentary record* (New Haven: Yale University Press, 1975) 182.

²²⁴ To reiterate, on this see; Fitzpatrick & Tuitt, *supra* note 79 at xi–xx; Pahuja, *supra* note 79 at 25–37.

part in this relationship be recognized as sovereign. The fact that Persia acceded to capitulations and concessions recognised it as a subject of modern international law, albeit, as I have sought to prove, as a lesser sovereign *because* of international law's grounding in the modern/colonial project. The self-constitution of the West through international law forms its identity in a "defining exclusion of certain existent peoples accorded characteristics ostensibly opposed to that identity"²²⁵, and the formation this exclusion is premised on the structures of the modern/colonial project, and its epistemic and ontological negations.

This did not mean that the recognition of a relative sovereign status for Persia protected it from interference. This was one of the purposes of legal technologies such as capitulations and concessions. Such documents allowed imperial powers, while *stabilizing* the principles and avowed universality of Eurocentric international law, to intervene legally in Persian affairs under the limits of international law. Interestingly such technologies had a very ambivalent role to play because, while stabilizing international law, they also destabilized it through the permission of interference in the affairs of another sovereign. My claim to this effect is that this is because international law is premised on the project of modernity/coloniality which, while having to preserve the appearances of a "universal" modernity, also maintains a "darker side", that of coloniality. What is denied is Persia's political capacity to challenge and oppose the underlying ideological political claim of modernity. As for the Ottoman Empire, in the case of Persia, the basic objective was that the "inertia" of the "Islamic mind" could not allow Persians to understand the universal truths of international law.²²⁶ They could only be expected to eventually imitate the truths of Western ethics, and interiorize international law.

In other words, the integration of Persia in the schemes of capitulations and concessions led it on a slippery slope towards the all out acceptance of the premises of modernity, and of its own coloniality, or backwardness. Legal Orientalism, in the case of concessions, is that premise of international law that establishes zones of exception where the principles of international law do not find their regular application. It is this mode of operation by which, while maintaining the appearances of international law, "law" is cut from a plurality of forms of ordering, which are

²²⁵ Darian-Smith & Fitzpatrick, *supra* note 174 at 1.

²²⁶ Cited in Cockayne, *supra* note 22 at 602. Original in Boissier et al, *supra* note 126 at 288.

then defined as something else – what law is ‘not’ – and denied the status of law.”²²⁷ It is this self-defining feature of international law, the legalization of the difference between the “modern” and the “traditional” that provides for the exclusion of forms of social or institutional ordering from the acceptable canon of legality, or legal subjectivity. An observation of the factual operation of the rules of the discipline then critically unearths the orientalist biases at their root. Much like in the case of capitulations, concessions established Persia as a zone where the Eurocentric principle of non-interference did not apply, while it was at the same time universally applicable in other zones.

Thus, because imperialists, under their own epistemic frame of reference, had to recognize a certain level of sovereign power to Persia in order to maintain the appearances of the universal application of modern international law, they could then not forcibly control Persian resources. They then had to acquire control of Persia and its resources through other means than direct military control, which is when concessions came in, giving the Qajar monarchs just enough sovereign power to alienate their “rights” and resources. As Anthony Anghie argued, since its early-modern foundations, international law has always given the Other a minimal level of sovereign authority. However, this status was merely that of a “quasi-sovereignty” that enabled the other to “transfer” its rights to imperial powers, and not really to actually vindicate such rights.²²⁸ An example of this, which I have yet to discuss because it will have a fundamental importance in the following section is that of concessions given to British entrepreneur William d’Arcy over the oil resources of Persia. In 1901, d’Arcy obtained from the Shah exclusive oil drilling concessions on *all* Persian territories for 60 years, except for the provinces under Russian influence (Khorasan, Azerbaijan). The Shah also extended the concession to a general tax exemption (which was transferred later to Anglo-Persian Oil Company (for clarity purposes, I will refer to the company as the AIOC, the Anglo-Iranian Oil Company, the name it took in 1935)), in return for a small share value in the company, and a percentage (16%) of the profits of the company. While d’Arcy’s project was barely afloat for its early years, his venture was bought off by the AIOC (jointly owned by the British government and the Burma Oil Company) when he

²²⁷ Pahuja, *supra* note 79 at 28.

²²⁸ Anghie, *supra* note 14; Anghie, *supra* note 101; Anghie, *supra* note 97.

discovered the rich deposits of Maiden-i Naftun in the country's southwest, close to the gulf.²²⁹ The AIOC then established its governance in the province of Khuzestan, factually subtracting it from the sovereign authority of the Shah.²³⁰

To recapitulate, this “cut” made by legal Orientalism and given effect through the technologies of international law also had the effect of imposing a form of “self-orientalization” on Persians that made them demand the import and integration of Western legal forms to face the onslaught of the imperialists at par. Underlying this process was the equation of the technical and scientific progress of Europe with an idea of cultural superiority, leading to Persians’ own self-alienation.²³¹ This led to the development of a modernist bourgeois class in the country through the integration of free trade and its necessary legal conceptions, ignoring the existent, but “backward” jurisdiction of Islamic law. In fact, this opening of the Persian market gave Western imperialists the possibility to totally appropriate and “negate” Persia’s political standing, from the commodification of its resources through “rights” given to foreign corporations, down to the psyche of its people through self-Orientalism and modernization.²³² The bourgeoisie’s demands for the import of legal positivism and its concretization in the constitutional movement, articulated in the idioms of private individual rights and contracts acquired and entered into by rational legal actors, constituted the linchpin of this ensuing modernization process. This modernization, as we will see in the following pages, imposed a totalizing Western modernity on Persia, a society in which it was totally foreign, and more importantly, showed the full breadth of the instability of the legal structure, and of legal Orientalism. Again, Persia’s political power, its capacity to Be for itself, of Persians to Be for themselves, and not “for others”, in their own taxonomy was undermined by the incapacity to exercise political agency on the international level *because* of the depoliticizing push of the international legal technologies.

C. Nationalism, secularism and the limits of sovereign authority

²²⁹ Hershlag, *supra* note 136 at 154; William L Cleveland, *A History of the Modern Middle East* (Boulder: Westview Press, 2004) at 190.

²³⁰ Cleveland, *supra* note 229 at 190.

²³¹ Nirumand, *supra* note 184 at 16.

²³² *Ibid* at 21–25.

“The white man ... desires the world and wants it for himself alone. He considers himself predestined to rule the world. He has made it useful to himself. But here are values which do not submit to his rule.”

- Frantz Fanon, *Peau Noire Masque Blanc*²³³

From the end of the 19th century through the early 20th century, Persia witnessed the withering of its sovereign capacities under the technologies of Western international law. However, it also, quite ambiguously, saw the strengthening of those sovereign capacities through the overhaul of the Persian state brought about by foreign interference, and the insertion of Persia in the Western international legal and economic order. Persia's general wholesale of its oil resources provides a great case study of this, and of the onslaught of these technologies under the umbrella of the project of Modernity. Indeed, not only were the Persian oil concessions given to the British very generous to the imperial power, but the general control of the concession and the lands on which it applied by the British-owned AIOC created a peculiar factual situation. The AIOC's physical presence in Iran and control over the oil industry was symptomatic of the dual effect of the capitulations and concessions, bringing British power to prominence in the region. The company built the world's largest oil refinery and its own town in Abadan, Khuzestan province, an area legally under Persian sovereignty, but factually removed from Persian power, a British condominium, if not a total imperial subjection. It employed only foreigners for most technical and managerial positions, leaving only fleeting underpaid positions to Persian labourers. Moreover, the company supplied its own municipal services and roads; it had its own airport and negotiated its own security deals with neighbouring tribes, and not with Qajar rulers.²³⁴ Even though the company was technically private, it could not fool anybody as its majority shareholder was the British government; and the company played a central role in transposing British interests in the country.

Central to the question of the AIOC and the oil industry however, is that of international law; we must not forget that it is through international legal technologies that the AIOC obtained its position in Persia. As I claimed previously, international law was one of the central vectors of political denial of Persian agency, creating a depoliticization of Persian sovereignty. Undeniably,

²³³ As translated and quoted in; John J Donohue, “Islam and the Search for Identity in the Arab World” in John L Esposito, ed, *Voices of Resurgent Islam* (New York: Oxford University Press, 1983) 48 at 55.

²³⁴ Cleveland, *supra* note 229 at 290–291.

the question of political (and thus state) power in Iran at the beginning of the century could certainly not be answered by mere reference to the actions and decrees of the monarchs, and the political debates inside the country. It required a far broader look at the international position of Persia in European power politics, and necessarily, international law. The British and Russian powers agreed on August 31st 1907, while “respect[ing] the integrity and independence of Persia and sincerely desiring the preservation of order”²³⁵ to divide the country in three zones. The zones virtually replicated each power’s zones of influence in the North and Southwest of the country, with a buffer zone in the middle that was to remain “neutral”. Clearly, Persia was not invited to the negotiating table while foreign powers were separating their zones of influence in its lands, the Persian state being conceived as the “neutral” entity. Those zones were under the quasi-sovereign authority of European companies exploiting concessions given by the Persian government; the British oil industry in the Southwest along the Gulf, and the Russian infrastructure, fishing and gas exploration companies in the North. Unmistakably, this imperial process of separation of land is not without similarities to the partition of the African continent at the Berlin conference of 1884, although on smaller scale. The result remains the same; the total depoliticization of a polity, rendered politically and ontologically null.

Moreover, the *political* situation could not be understood merely by looking at the international technologies and means applied in Persia. What I mean by this is that, firstly, such ills, because of the semi-periphery’s very reality, were somewhat caused by Persian agency under the schemes of international law. Secondly, I mean that we must then scrutinize the intellectual and epistemic roots of foreign influence, and the effects of this influence in order to understand how Persian agency was played. As I have argued, international law was premised on a legal form of Orientalism that imposed a derogatory view of themselves on the people it affected. Indeed, capitulations and concessions constrained the sovereign powers of the Persian rulers to the point that Persians perceived the problem as lying within their own “backwardness”. If capitulations were required, it was because Islamic law could not give sufficient guarantees. If concessions were needed, it was because Persians did not have the “economic rationality” required to participate in the modern liberal international law and its free trade system

²³⁵ Jacob C Hurewitz, ed, “Anglo-Russian Convention on Persia, Afghanistan and Tibet - August 31 1907” in *The Middle East and North Africa in world politics: a documentary record* (New Haven: Yale University Press, 1975) 265 at 266.

(dominated by the industrious Western powers). The politics of Persia, in that scheme were certainly affected by the epistemic/hermeneutical frame of reference of the Western powers. Questions that interested Persians and answers to those questions were then connected to the concerns of the West, and required proficiency in its language. In other words, answers to “backwardness” were to be found in modern advanced nations, answers to religious fanaticism and irrationality were to be found in modern secular “neutral” nation.

This section will provide a discussion on the evolution of the internalization of the language of international law, from the late-Qajar era, to the state nationalism period of early Pahlavism. What my argument will focus on is how the critical instability of the discipline, which reproduces the modern/colonial project, undermined the modernized Islamicate elites’ claim to sovereign equality, while they sought to use it to their own advantage. In other words, I seek to prove that the tentative appropriation of the language of international law to form a Persian legal consciousness, only led to the undermining of Persians’ claims to sovereignty. The central claim I make is that Persia’s, and later Iran’s, quest for repoliticization and political equality on the international scene, voiced in the language of international law, led to Persia becoming a mirror image of the depoliticized Western modern state.²³⁶ The Western state form was depoliticized, I claim, because it was defined under an un-negotiated and non-negotiable political consensus of liberal internationalism. It then precluded the possibility of a political debate ever happening on the form and substance of the conceptual and material apparatus of the state.

The years that followed the constitutional revolution highlighted that its tentative repoliticizing effects were not those sought by the Persian modernist elite. The constitutional revolution sought to answer questions that, as we saw previously, did not address the issues important to Iranians (i.e. foreign interference as was the problem with the Tobacco revolution), but rather the problems pointed at by the legal technologies of the West, namely secularism, and the necessity of a liberal system of rights centred on private property. The revolution was merely the product of a struggle in which the two opposing sides, the monarchists and the

²³⁶ Ngugi speaks of this usage of legal means; Joel Ngugi, “The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa” (2002) 20 *Wisconsin International Law Journal* 297 at 304; Natsu Taylor Saito, *Meeting the Enemy American: Exceptionalism and International Law* (New York: New York University Press, 2010) at 194.

constitutionalists, were under Western patronage from respectively the Russian and the British powers.²³⁷

In fact, the prevailing political consensus *about* Persia, but not necessarily *in* Persia, was not held by Persian institutions, but was already under the grip of the project of modernity/coloniality, firmly imposed by western legal technologies wielded by imperial powers. Indeed, whatever the result, monarchists or democrats would maintain the regime of domination already in place under the binding effect of international treaties. “[T]he very way in which society is instituted”²³⁸ in Persia, its foundational principles, its normative space of power after the constitutional revolution is not a Persian matter anymore, but a matter of opposing Western modernists.

Essentially, the Qajar sovereigns had been maintained in power for decades thanks to the intervention of foreign imperial powers²³⁹, so that they could extract from them internationally and nationally enforceable concessions and other international documents. The political power in Persia, the capacity for Persians to Be for themselves and not for others in their own taxonomy was undermined by the incapacity to exercise political agency on the international level. While this might appear as a concern that is quite distant from the hard matter of daily reality in Persia, we must not forget Anghie’s conclusions that the subordination of the native people of the Americas was premised on Vitoria’s limitation of their agency. As the author has proposed, the right of the natives to dispose of themselves or their resources and livelihoods, to Be politically, to have a political claim that could be negotiated with the Europeans, an actual agency and ontology; this right was established only insofar as to allow them to alienate their resources, and to be bound by international law.²⁴⁰

Very similarly, as I have argued previously, Persia’s agency was considered and given legal meaning only insofar as the country itself was a geopolitical buffer zone for the imperial powers, and for the Qajars to alienate their resources. As Chatterjee has pointed out, referring to

²³⁷ Hershlag, *supra* note 136 at 154.

²³⁸ Mouffe, *supra* note 45 at 9.

²³⁹ Keddie, *supra* note 173 at 3.

²⁴⁰ Anghie, *supra* note 97 at 745; Anghie, *supra* note 101; Anghie, *supra* note 14, chs 1–2.

numerous Iranian sources, the new Persian modernist intelligentsia was determined that progress was to be attained only if royal despotism, clerical dogmatism and foreign imperialism could be broken.²⁴¹ All signs then pointed to the necessity to modernize and to secularize Iranian society. At the convergence of all points rested the concept of nationalism, and the institutions of the Western state, which, it was thought, would at least instrumentally elevate Persia to a level of equality with Western societies.

The pervasive invasion of foreign legal conceptions through the technologies of international law led local actors, around the region and in Persia, to revert from their struggle against imperialist modernity into imitation of this same modernity. A great example is that of the thinkers of the *Nahda* movement, the Islamic renaissance of the late 19th century. They argued, somewhat similarly to the Young Turks, that Islam and modernity were not opposed, and then sought to provide a legitimation of modernity in Islamic terms, for example through the concept of *al-watan*, the homeland, the nation.²⁴² Following the empty hopes of sovereign power and equality given by European powers to Arab leaders during and after the First World War, many local and regional “nationalisms” were iterated in the Middle-East. In those movements centred around the personas of Rashid Rida and Shakib Arslan (who petitioned for recognition at the League of Nations, which refused to hear most of his concerns especially concerning French exactions in mandate Syria²⁴³), amongst others, cultural and historical elements took over the religious in order to formulate the requirements needed for the establishment of the western state, the modern political entity.²⁴⁴

Early petitions to the League of Nations for national recognition and the failure thereof had a strong influence on the later thought of Islamicate nationalists of the 1940s and 50s. Iterations of Arab nationalism, for example, in the thought of Michel Aflaq in Syria, Abd al-Rahman al-Bazzaz of Iraq or Jamal Abd al-Nasser of Egypt, while paying lip service to the place of Islam, “authenticity” and a semi-peripheral (colonial in some situations) opposition to the

²⁴¹ Kingshuk Chatterjee, *Ali Shari'ati and the Shaping of Political Islam in Iran* (New York: Palgrave Macmillan, 2011) at 22.

²⁴² Hamid 'Inayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982).

²⁴³ Becker Lorca, *supra* note 22 at 293–297.

²⁴⁴ John J Donohue & John L Esposito, *Islam in Transition: Muslim Perspectives* (New York: Oxford University Press, 1982) at 57, 60; John J Donohue, “Islam and the Search for Identity in the Arab World” in John L Esposito, ed, *Voices of Resurgent Islam* (New York: Oxford University Press, 1983) 48 at 49.

West²⁴⁵, was quite centrally concerned with a strong state-centric political nationalism detached from any real engagement with religion or actual local cultural taxonomies.²⁴⁶ In that sense, I would propose that this acceptance of the language of international law and the nation-state opened the door for an epistemic domination and ontological negation of Islamicate aspirations.

It comes as no surprise that, when Persia sought representations at the Paris Peace Conference in 1919, its claim to national sovereignty was articulated in Western international legal terms. Persia's presence at the conference was indeed not fortuitous; it was invaded at the end of the First World War by both British and Soviet forces, the former fearing the spread of the Soviet revolution in Persia.²⁴⁷ Persia's claim was based on the idea that its independence was seriously undermined by Western presence in its territory, namely consular jurisdiction and commercial privileges given to foreign residents. Its claims were that this sort of treaties was in contravention to the spirit of modernity and of sovereign authority and integrity of the Iranian state.²⁴⁸ The arguments put forward by the Persians, echoing to an extent the doctrine of *rebus sic stantibus*, or change of circumstances, consisted in a localized iteration of the principles of international law. In a sense then, we see that Persian elites, in their representations, have sought to appropriate for themselves a legal consciousness steeped in the language of the imperial powers, in order to fight against those same imperial powers on a levelled ground.

However, none of this allowed Persia to represent itself and to seek national recognition and the abrogation of the Anglo-Russian treaty of 1907 at the Peace conference. The best it was allowed to do was the production of a set of short communications, to voice its claims.²⁴⁹ British imperialist Sir Percy Sykes, in his *History of Persia*, notes that Persian claims at the conference were “unpractical” and “fantastic”, especially those with regards to the recovery of its jurisdictional and sovereign authority, mostly due to “the risks that are constantly run by European subjects living in Persia”²⁵⁰. Indeed, Persia could not claim the restoration of its

²⁴⁵ Donohue, *supra* note 244.

²⁴⁶ Bassam Tibi, Marion Farouk-Sluglett & Peter Sluglett, *Arab nationalism: between Islam and the nation-state* (New York: St. Martin's Press, 1997), chs 11–12.

²⁴⁷ Ervand Abrahamian, *Iran Between Two Revolutions* (Princeton: Princeton University Press, 1982) at 116–117.

²⁴⁸ Becker Lorca, *supra* note 22 at 247.

²⁴⁹ Hoover institution on war, revolution and peace (Stanford Calif), *A Catalogue of Paris Peace Conference Delegation Propaganda in the Hoover War Library* (Stanford: Stanford University Press, 1926) at 15.

²⁵⁰ Sir Percy Sykes, *A History Of Persia* (London: Routledge, 2013) at 518.

sovereign powers and territorial integrity, for it was “oblivious of the fact that chronic anarchy and corruption reign within her own borders”²⁵¹. What was missing in Persia, for it to be brought to the negotiating table, Sykes hints, is a more practical take at statesmanship. Again, Persia finds itself in a dead-end, with the only solutions offered to it being found in the status of statehood.

The end of the First World War saw, in Persia, the rise of the nationalist movement that would soon recast the country into Iran. This new national movement was different from what was seen during the *Mashruteh* period because its goal was to deploy the tools provided by a modern Westernized state to the service of the Iranian “nation”, and not merely to replicate some forms of the modern Western state and law. The objective of this movement was to give Persia, and soon enough, the new nation of Iran, an equal position of power to help the nation defend itself from Western interference, but also to redefine exactly *what* was Iran.²⁵² In that sense, the Anglo-Persian Agreement of 1919²⁵³ arguably had a central role to play in the fundamental regime change that happened in 1921 in Persia, and would affect it for the following half-century.

The agreement, while reiterating the classic legalese “respect [... for] the independence and integrity of Persia”, basically does what a previous half-century of agreements had generated. First, it provided (British) advisors with the “adequate powers”, at the costs of the Persian government, to develop their institutions and their military. Second, it financed the Persian government with a substantial loan (in order to buy ammunitions, remunerate British experts, and “modernize” its institutions and communications) secured by a British hold on customs duties, which were to be re-evaluated with regards to British goods. Generally, the agreement would allow for the commercial rapprochement of an industrial Great Britain and a mainly agricultural Persia. The signing of this agreement with Great Britain, and the earlier annexation of the north of country by Soviet Russia led to a *de facto* situation in which the Persian government virtually lost control of the country. A regime change was required, and a young general in the army, Reza Khan, would rise to the task.

²⁵¹ *Ibid* at 519.

²⁵² Chatterjee, *supra* note 241 at 26.

²⁵³ Sykes, *supra* note 250 at 520.

Tacitly supported by the British (who feared the threat that communism might pose to its holdings in the Indian subcontinent), Reza Khan forced a humiliating defeat on Russian troops and Russian-backed militias from the North, exhorting the Soviet government to sign the Russo-Persian treaty of Friendship ²⁵⁴. Understanding the critical power of international legal documents, and both parties recognizing a change of circumstances, Persia's persistent argument for the doctrine of *rebus sic stantibus* finally gained ground. The first article of the treaty abrogated all previous treaties, including the treaty of Turkmanchay and all concessions. After this astounding victory against a foreign power, something Persia had not seen in decades if not centuries, Reza Khan was well positioned to stall British interference in the country. After the events of 1921, the Persian general of the Cossacks brigade took the title of *sardar sepah*, commander in chief of the Persian armies, and secured the country's borders. ²⁵⁵ Strong with his new title, Reza Khan's goal was to establish the state's central authority over the armed tribal leaders with a firmness that the Qajar would have never envisioned. ²⁵⁶ Indeed, concepts that had already made their way into neighbouring Arab societies such as the dominant western-influenced category of *wataniyyat* (national identity or nation) started influencing Iranian society. What Reza Khan was after then was the reinstatement of a centralized order of state, with its monopoly on violence, and firmly established national borders; the standard of the Western state project.

Reza Khan's military campaigns against tribal leaders stabilized the country's borders, and were more than instrumental in establishing a unitary national identity for Iran. The state acted as a sort of disciplinary actor that rectified the concomitant iterations of non-modern identities inside the borders of Iran. The state acted as the defining element in border-making, re-establishing its frontiers against the non-modern (tribal leaders), or what was perceived as such (communism, notably, and the soviet sphere of influence was arguably portrayed as such for communism did not share the paradigm of liberal internationalism), effecting the "cut" favoured by modern international law. Reza Khan's influences were unmistakably entwined with the Kemalist project of Atatürk's neighbouring post-war Turkey. The model provided by Mustafa

²⁵⁴ Jacob C Hurewitz, "Treaty of Friendship: Persia and Russia, 26 February-12 December 1921" in *Diplomacy in the Near and Middle East; a documentary record* (New Haven: Yale University Press, 1975) 90.

²⁵⁵ Abrahamian, *supra* note 247 at 118–135.

²⁵⁶ Cleveland, *supra* note 229 at 187.

Kemal Atatürk had, for the Pahlavi ruler, shown how a Muslim *nation* could modernize through westernization, leading Reza Khan to follow a similar path.²⁵⁷ As I argued previously, the state's capacity at "cutting", defining its borders against an Other, was one of the central modes of operation of the frame of modern international law under the modern/colonial project. To obtain international agency, the state had to be factually defined, to be an observable constituted authority over a territory.

This authority needed to be defined against other authorities, both internally and externally, the later being defined against other states and the former against others who contended for state power. However, the discourse of modernity/coloniality discredits contending non-moderns as incapable of holding the modern seat of authority, leaving the political space open only to those who fulfil the modern and liberal criteria for agency. In other words, modernity, because of its emphasis on reason, is a depoliticizing narrative that reduces the ontological existence of that which is not modern, both in and outside of the state, its central vector. In defining the borders of Iran, Reza Khan had to submit what would constitute a challenge to its nascent modern state power and national identity because of their own claims to sovereign power, whether they be tribal or religious actors.

Such contending political iterations were found, most importantly, in the insurgencies of the North; Kurds, Azeris, Turkmens. Necessarily, the negation of, for example, a Kurdish tribal/cultural taxonomy entails that the Kurds were victim to the *political* violence at the origin of the instauration of the state. The creation of the borders of Iran was then founded on a direct political violence that negated the agency of others to participate in the foundational political negotiation of the liberal state, and of the international legal agency that derived from it. All living on the territory of Iran, with no regard to their ethnic background, language or religions/sectarian affiliation were now one single nation inhabiting one homeland, governed by one "neutral" state.

²⁵⁷ Afshin Marashi, "Performing the Nation: The Shah's Official State Visit to Kemalist Turkey, June to July 1934" in Stephanie Cronin, ed, *The Making of Modern Iran: State and Society Under Riza Shah 1921-1941* (London: Routledge Curzon, 2003) 98.

After having secured the borders of what would become the Iranian state, Reza Khan returned to Tehran to centralize state power into a modern institutionalized authority. To do so, he succeeded in forcing the Qajar monarch into exile, a move later confirmed formally by the Majlis in 1925.²⁵⁸ He was declared Reza Shah Pahlavi, first of the Pahlavi dynasty, that same year. Having lost its central political ally in the country (the monarchy), British influence was substantially lessened, leaving much space for Persia's national affirmation. The shift towards the "nation" was then, much like as it was in Western nationalism, a self-constitutive move; it would create a nation and its state institutions where previously there were other forms of social affinities, in the case of Persia, a Shahdom. Reza Shah re-centred political power in the Iranian state; he cancelled the extraterritorial jurisdiction privileges given to European nations by the Qajar rulers in the 19th century, and dismissed foreign officials who had been appointed in positions of influence.²⁵⁹ The Imperial Bank lost its role and stranglehold over Persian finances in 1928 after the creation of the Bank Melli, an Iranian-controlled central bank, and was forced to relinquish its note-issuing powers in 1933 by Reza Shah's government.²⁶⁰ However, a point to which I will return shortly in my conclusion, Reza Shah had notably less success in reducing the power of the AIOC, although he cancelled the 1912 concession in 1932. This cancellation ended in a failure to increase Iran's share in oil revenues in the new concession negotiated the following year.²⁶¹ Property rights were now a feature of modern Persia, and through international legal technologies, property rights had been relinquished by the Persian state, a move that could not be easily annulled due to the AIOC's quasi-sovereign control over Khuzestan's oil resources.

From this point on, the state became the central marker as to what it meant politically, socially and *culturally* to be Iranian, and constituted the sovereign political powers of Iran. One of the central projects of the modernizing Reza Shah was, in following Atatürk's Turkey, his "promot[ion of] an unprecedented degree of secularism in public life [... and] attempt[ing] to separate the institutions of the state from those of religion and thus to create a primary loyalty to the nation and its emerging secular structures"²⁶². The institutional project of the modern Iranian

²⁵⁸ Abrahamian, *supra* note 247 at 118–135.

²⁵⁹ Michael Zirinsky, "Riza Shah's Abrogation of Capitulations 1927-28" in Stephanie Cronin, ed, *The Making of Modern Iran: State and Society Under Riza Shah 1921-1941* (London: Routledge Curzon, 2003) 81.

²⁶⁰ Jones, *supra* note 192.

²⁶¹ Cleveland, *supra* note 229 at 190.

²⁶² *Ibid* at 175.

state was to follow the lines of a western-minded secularization in its elision of the Islamic character of Persia. Looking back at the previous sections, this move comes as no surprise due to the self-Orientalism effect imported by the technologies of international law in Persia. As I have argued, Persia's Islamic character and Oriental irrationality were portrayed as the central drawbacks on its attaining the status of sovereign power. Persians had to get rid of such traits to attain the level of development required by international law to have sovereign agency. Similar to Turkish modernists (Kemalists), Persian modernists of whom Reza Shah was the proponent, viewed European society as the epitome of civilization, and its institutions as a synonym of progress. This perspective was that a "localization" of the institutions of Europe would give sovereign equality to the nations of the Islamicate world, while also retaining the critical potential of their position against the West.²⁶³ In other words, the claim was to use the institutions and the language of equality of the West against their unequal treatment of the Islamicate world.

This process of secularization, following the legal Orientalist inspirations of previous international legal technologies, especially the capitulations of the 19th century, was centrally in the legal and judicial spheres. In 1928, the Majlis adopted a new civil code, introduced from the French Code Civil. This code, while retaining a few elements of *shari'ah* law²⁶⁴, generally went against the elements of the Supplementary Laws of 1907 that, at the insistence of the *'ulama*, maintained some of Persia's Islamic taxonomy in preventing new laws from going against Islam (they were to be "conformable" to the *shari'ah*). The modernists simply ignored the Supplementary Laws. Furthermore, the *'ulama*'s position in courts was completely brushed aside by a modification of the judiciary that took away most of the jurisdiction of religious courts, giving full power to secular officials in matters of justice.²⁶⁵ Religious courts were not totally abrogated, but their jurisdiction was left to the discretion of the secular judges, who would decide which cases could be heard by the religious institutions, thus bypassing the *Supplementary Laws*. The *'ulama*'s position was further marginalized by a 1936 law that established that all officials of justice were to obtain a law degree from the recently founded (1934) Tehran University Faculty

²⁶³ Hanioglu, *supra* note 177, ch 3.

²⁶⁴ Those elements were kept mostly with regard to personal status, inheritance law, which remained faithful to Ja'afari and Ithna 'Ashari jurisprudence, and the patriarchal structure of the family (such as the discriminatory marriage/divorce provisions), as defined in traditional Shi'i jurisprudence. See Ziba Mir-Hosseini, "Sharia and National Laws in Iran" in Jan Michiel Otto, ed, *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010) 318.

²⁶⁵ Cleveland, *supra* note 229 at 187–188.

of Law, the first in the country, or from a foreign university where they have undergone at least three years of study.²⁶⁶ This law formally abolished the religious courts system, and, interestingly, allowed foreign-trained lawyers, knowledgeable in foreign legal systems, to adjudicate legal cases in a legal system and a society they did not technically know. This goes to show the depth of the effects of legal Orientalism and its self-afflicting effects; Islamic law was to be eradicated in the process of modernization because the backwards Iranian had to cure themselves of their wretchedness, and become Modern like the West, a “neutral” state.

The secularization process however did not stop there; the opening of Tehran University in 1934 signalled the end of the monopoly of Islamic seminars on higher education and the religious control over intellectual professions. This was also supported by an enhancement of the scholarships program that would allow Iranian students to study, generally law and technical professions, abroad.²⁶⁷ This modernization system was to allow a fast-tracking of Persian citizens directly into civil service in order to form a new class of bureaucrats whose members would share the values and the interests of the state, and its attitudes towards modernization reforms. Moreover, in 1932 the system of property rights that was established with the constitution required that *waqf* lands be seized by the state and redistributed, which was done in 1939. This move followed the 1932 prohibition for the religious authorities to register legal documents, which dealt a serious blow to the religious’ financial capacities, and independence.

Two decades into the modernization of Iran, the religious establishment’s authority was seriously shaken and handicapped, to the point at which the religious authorities became a mere contiguous concern for the authorities. This is exemplified for example in the attempts of the new Pahlavi regime to ban religious headgear and the veiling of women in 1936, as well as its restriction on traditional religious practices, actions that were perceived by the population to be alienating them from one of their central cultural referents; Islam.²⁶⁸ Such laws were necessarily premised on the enactment and favouring of European modernity; a law of 1928 required men to dress à la European, and another in 1935 made the wearing of a hat compulsory.

²⁶⁶ “Judicial and Legal Systems v. Judicial System in the 20th Century”, (May 2016), online: *Columbia University’s Encyclopaedia Iranica* <<http://www.iranicaonline.org/articles/judicial-and-legal-systems-v-judicial-system-in-the-20th-century>>; Mottahedeh, *supra* note 186 at 227; Cleveland, *supra* note 229 at 187–188.

²⁶⁷ Cleveland, *supra* note 229 at 188.

²⁶⁸ Chatterjee, *supra* note 241 at 32; Cleveland, *supra* note 229 at 188.

With regards to the formation of the national sentiment in Iran, Reza Shah was to follow the pattern of national self-assertiveness set a few years earlier by the Kemalists in Turkey. However, as Chatterjee notes, this process of definition of identity was one totally detached from the population and its cultural taxonomy.²⁶⁹ The Pahlavi definition of the Iranian nation was symptomatic of the previous two phenomena of the centrality of secularism and self-Orientalism catalyzed in the creation of the state. Reza Shah's development of an Iranian national secular culture meant the construction of symbols that would tie Iran to a non-Islamic existence. In that sense, the renaming of Persia as Iran was an attempt to decenter Islam from its national life, and to relegate religion to a private individual matter. Especially at a time when Hitler was championing Aryan racial supremacy, Reza Shah's affirmation of Iran's pre-Islamic Aryan past was a bold but clear movement for the assertion of a secular identity totally detached from Islam and, in the language of the time, its Semitic roots.²⁷⁰ In fact, as argued in 1936, at the peak of Reza Shah's rule, by an Iranian student in his dissertation *Le culte d'état chez la nation iranienne*, the "cult of the state" was, for Iranians, since pre-Islamic times, the central banner around which they gathered.²⁷¹ Kurds and Azeris in the north, as well as the *'ulama*, arguably substantially differed on this issue.

While this move was certainly in the hope of legitimately creating an Iranian agency and sovereign authority, it was also, centrally, well integrated into the project of modernity/coloniality. Indeed, since Iran fell prey to the technologies of international law, its own taxonomy, its normative and political ontology had been drawn away from Islam, closer to the dictates of European modernity. The existence of Iran, its Being, intertwined with an Islamic vision of the world, amongst other leanings, was reduced to its mere ontic manifestations; Islam and the pre-Islamic Persian past, the Aryan roots of the country all constituted not ontological claims, but "cultural" manifestations that substantiated Iran's claim to *national* existence and modern statehood. The renaming of Persia to Iran was itself such a move; Iran, in Persian language, means "Land of the Aryans", referring to the Airynam Vaejah, the Avestani name for

²⁶⁹ Chatterjee, *supra* note 241 at 26.

²⁷⁰ Touraj Atabaki & Erik Jan Zürcher, *Men of Order Authoritarian Modernization Under Atatürk and Reza Shah* (London: I.B. Tauris, 2004) at 253; Chatterjee, *supra* note 241 at 38–39.

²⁷¹ Ali-Asghar Khachayar, *Le culte d'état chez la nation iranienne (démontré à travers les âges en vue de la paix)* (Librairie Lipschutz, 1936) [unpublished].

the homeland of the Aryans. Iran was then certainly following the mythologizing nationalist claims of Nazi Germany, instituting a modern “cut” with other “lesser” people on reified cultural bases. Rosenberg, one of the Third Reich’s top philosophers claimed in his *Myth of the Twentieth Century* that Iran had been corrupted by the Semitic Arabs and Islam, and thus had to leave this heritage to the past to establish itself as a modern nation.

Secularism and the quest for Western nationalist modernity were not a response to the demands of the masses, whether we are considering Kemalist Turkey or Pahlavi Iran. Taking Turkey as an example, the abolition of the caliphate in 1923 was a very symbolic act that forced a break in Ottoman history. The end of the Caliphate was a clear political act that reproduced the colonial drama of the modern/colonial project; the authority of the new Turkish republic was no more to be found in and derived from its Islamicate history. The drama it reproduced was that the West had the state and civilization, had the Republic, whereas the Orient had only superstition, caliphs, shahs, sultans and institutions from the past.²⁷² The nationalist plan of Pahlavism and Kemalism was stemming from a broader project that had to do with the establishment of a hegemonic political consensus, notably in international law, relating to the particular institutional forms required for sovereign agency. This was the effect of the project of modernity/coloniality; it was nothing else than a project of Westernization that instantiated a divide between that which conformed to the experience of the West, and that which did not; it more often than not meant, in the Islamicate world, de-Islamisation, and more broadly, depoliticization through denial of an Islamic political ontology.²⁷³

In fact, the pseudo-consensus on secularism had one fundamental effect; it hid from sight the power relations through which some groups claimed authority over others.²⁷⁴ It did so by naturalising, and universalising the modern/colonial project, namely the superiority of Western thought and categories, its episteme and hermeneutical frame, from industry to market and government. This had the effect of establishing the specific historiography of Europe, that of the developmental state, of liberalism, and of modern secular law as the universal truths that were

²⁷² Salman Sayyid, “Khomeini and the Decolonization of the Political” in *A Critical Introduction to Khomeini*, Arshin Adib-Moghaddam ed (Cambridge: Cambridge University Press, 2014) at 281.

²⁷³ Sayyid, *supra* note 127 at 37.

²⁷⁴ *Ibid* at 41.

leading mankind to the higher stages of its evolution. Necessarily, such a project, as I proposed, reduces other knowledges and other ontologies as imperfect, fallible, folkloric or traditional, and thus as incapable of leading mankind. In that sense, the evacuation of the Islamic history of the Ottoman Empire from the political claim proposed by the new Republic of Turkey meant the creation of a new political subject, a repoliticization for the Turks and Persians that did not derive from its Islamicate history, but was mostly dependent on a Western scheme of reference.²⁷⁵

This naturalisation of the experience of the West in Turkey and Persia elided the basis for a political contestation from an Islamicate polity; Islam was depoliticized and denied further ontological possibility. The legitimacy on which an Islamic political claim is founded was refuted, and thus could not politically oppose the stranglehold that liberal international law imposed on it. What it meant to be Muslim was no longer *political*; it could only mean a form of private attachment to a traditional way of life.²⁷⁶ It constituted a total acceptance that *political* subjectivity could only be acquired in the language of nationalism, and thus, in the language of the West.

In other words, an Islamicate subject could not bring a political contestation forward because the question of Islam, of religion and its capacity to occupy state power, was relegated to a question of the *politics* of secularism, a question contained within the allowed politics of modern liberalism. Islam, through Kemalism, nationalism or other secular ideologies was reduced to what it was not; a mere reified and unchanging phenomenon, trapped in the past. This portrayal of Islam as an element of the past refuses its ontology; the fact that Islam, as a religion, is integral to society and constitutes its political and thus normative possibility.²⁷⁷ International law was central to this refuting, depoliticizing project; the West had states, the non-West caliphates and tribes, the West had reason, the non-West had Islam, the West had free trade, the non-West was incapable of economic rationality. It has in fact been quite convincingly argued that Kemalism and nationalism, as they were applied in the Middle East from the interwar period

²⁷⁵ Sayyid, *supra* note 272 at 281.

²⁷⁶ *Ibid.*

²⁷⁷ al-Sadiq al-Mahdi, "Islam – Society and Change" in John L Esposito, ed, *Voices of Resurgent Islam* (New York: Oxford University Press, 1983) 230.

onwards where strong forms of self-Orientalism, of reducing one's ontology to the reified definitions given by a dominant hegemonic cultural ideology²⁷⁸.

What is most striking in this is the constituted nature of this scheme; neither the West nor the Orient, the Islamicate or Persia were immutable essences in themselves. The only thing that was immutable in the modern liberal scheme was the frontier, the border that was established between one and the other because the border itself was the constitutive praxis of both sides. The establishment of this border was what allowed one side to constitute itself against the other, and to deploy technologies and operations to give a real function to the difference. It is the border that helps in constituting the reality, the essence, of both sides of the border. To clarify, the frontier between the West and the non-West is what specifies “modernity”, which, as a project, the civilisation of the West vis-à-vis the rest of the World, does not really exist in an absolute universal as it is portrayed. It is only the universal portrayal of the experience of Europe that creates this frame of mind. As long as the discourse of the specificity of the West against the rest of the world will hold sway, it will always require a frontier to determine what is included and excluded from its specificity.²⁷⁹

As this section has sought to highlight, when it comes to the relations between both sides of a dividing border, a “cut”, what should theoretically be the political negotiation of the norms that will inform those relations, we realize that one side has been denied political agency. Indeed, what makes international law “modern” is its own self-constitutive distinguishing from what it creates as its emblematic past normative certainty founded in pre-modern irrational religious laws, or even natural laws. International law is modern because it is positive, relying on universally observable normative principles founded on rational logic. This rationality is then capable of establishing rules such as the primacy of the (European) state in the organization and agency of society. This “modern” is then opposed to the irrational, transcendent and reified

²⁷⁸ Yasin Aktay, *Body, Text, Identity: The Islamist Discourse of Authenticity in Modern Turkey* (D.Phil Thesis, Middle East Technical University, 1997) [unpublished] at 265; Sayyid, *supra* note 272 at 281; Sayyid, *supra* note 127, chs 3, 5.

²⁷⁹ Sayyid, *supra* note 127 at 71.

religious principles that are, according to the modern episteme, divorced by their very nature from the practical preoccupations of their societies.²⁸⁰

The project of modernity is then necessarily hegemonic; it seeks, through the medium of international law, its modes of operation and technologies, to impose an episteme and ontology on the Other to rectify its failures. The reasons for this are embedded in the matrix of power of modernity; ending religious irrationality (for fear of its unsettling effects on the possibility of the international stability of a state-based order), the expansion of the free market and liberal economic rationality (as we have seen for concessions), and the unifying, standardizing effect of nation-statism. What we are dealing with here, however, is not a crude brutish form of hegemony that relies on sheer domination for its confirmation. Rather, the hegemony at play here is an ideological one, a sort of global extension of Althusser's "ideological state apparatus", what Wang Hui has extended into an "ideological global apparatus"²⁸¹. Indeed, imperial power and hegemony rest on the foundations of a monopoly of violence, economic dominance and a softer power, an epistemological and ontological dominance that displays the function of a "ideological global apparatus". This last apparatus serves as the cultural, and not repressive, reinforcement of the rule of the dominant worldview, or epistemic paradigm. This softer global power, which I claim is a position held by the rules of international law, submits polities to a paradigmatic Western modernity by instating an effect of self-loathing and self-affliction to those actors who do not follow that paradigm.²⁸²

As described by Gramsci, it is a *cultural* hegemony that can control the societal forums that can produce and reproduce the dominant ideology.²⁸³ As Gramsci proposed, the state is itself the central medium through which a dominant class can produce and reproduce its ruling ideology.²⁸⁴ Hegemony here did not mean the total subalternization of the Other, its silencing. Rather, this Other was encouraged to represent itself in the forums of international law, where the liberal consensus could be discussed but hardly debated from a different political perspective. As

²⁸⁰ Afsah, *supra* note 222 at 262–263.

²⁸¹ Hui Wang, *The End of the Revolution; China and the Limits of Modernity* (London: Verso, 2011) at 16.

²⁸² For more on this see; Louis Althusser, "Idéologie et appareils idéologiques d'État (Notes pour une recherche)" (1970) 151 *La Pensée*.

²⁸³ Louis Althusser, "Idéologie et appareils idéologiques d'État (Notes pour une recherche)" (1970) 151 *La Pensée*.

²⁸⁴ *Ibid* at 234.

long as the “colonial” side of the divide spoke from the position of the accepted liberal consensus, following the rules of politics that derived from this consensus, its agency was accepted. The ideological global apparatus that is international law allows for the expansion of this hegemony, and for the constraining of the language of the international political field. The subaltern here could speak, but only from the position of the framework that dominates it; it has the agency, and the legal consciousness required, but this agency, rather than being genuine, is constrained by the epistemic and ontological hegemony of Western project of modernity. In other words, the Islamicate world had to accept its own disrepute if it wanted to represent itself in the forums of international law, and end the exceptional application of the rectifying modes of operation and technologies of international law.

It was only with Iran’s deployment of a national sentiment and a modern claim to statehood that the Islamicate polity could suspend the application of capitulations and concessions, and benefit from the system of international law. This required that Reza Khan’s Persia and then Iran negate all other contending political claims inside the country, through sheer repressive violence for some (the establishment of its state borders through military campaigns), and ideological legal technologies for others (the concept of secular statehood). My underlying claim is then that, the most important mode of operation of international law and its emphasis on the nation-state, was its ideological domination of the episteme of the Other. It is the fact that through international law, the global ideological (and repressive) apparatus of the project of modernity is extended to local populations by the ideological and repressive state apparatus. The Muslim other, the Islamicate world, could not refer to itself in its own scheme of reference, in its own language, its own episteme because of the effect of the scheme of cultural hegemony established by the technologies and operations of international law.

Conclusion

Persia, from its defeat against the Russian Empire and the ensuing treaty of Turmanchay, was on its way to becoming Iran. As I have argued previously, from this point onwards, it was subjected by imperial powers, centrally Russia and then Great Britain, to numerous international legal technologies that functioned under a mode of Legal Orientalism. What this meant is that the said technologies were premised on preconceived ideas and imagined geographies that instituted the Orient as a zone of exception in the grander structure of international law. Persia was, under that scheme, subtracted from the regular application of the rules of the discipline until it could “remediate” its oriental character. From capitulations to concessions and the logic of statism, international law’s effect in the zone of exception, the Islamicate world, was not one based on its avowed principles of sovereign equality, but was rather an effect of “remediation”.

The Islamic or Oriental character of Persia had to be rectified. Indeed, the fact that Persia remained an Islamicate Shahdom in a world that was increasingly structured by an imperial Eurocentric reality, that of a center and its periphery²⁸⁵, was an aberration, and this aberration was to cease. The possibility of a middle ground in this system, of a semi-periphery that remained roughly independent from the colonial power and the modern project, was a variable that could not be acceptable. In fact, the liberal order was premised on the idea of a universal system that would regulate the interactions between equal (and thus homogenized) sovereigns. Thus, the situation required the action of the full force of the ideological and repressive apparatuses of this modern liberal political consensus. International law and its modes of operation, as I have sought to prove, provide the means to effect this political consensus through its rules and technologies, which force a consensus that gives effect to a global ideological apparatus premised on the modern liberal ideology. This structure was rooted, as it was the case for Persia, in the definition of the central legal actor; the “neutral”, universal state, which then becomes the repressive and ideological apparatus that forms the central vector of the expansion of international law. The state, however, is “never the manifestation of a deeper objectivity exterior to the practices that bring it into being”²⁸⁶; it is the vector of the project of modernity.

²⁸⁵ Wallerstein, *supra* note 182.

²⁸⁶ Mouffe, *supra* note 45 at 17–18.

A state, through its repressive interaction with a non-state, can “rectify” what needs remediation so that the non-state can take on the meaning of the ideological apparatus of the state. Necessarily then, this hides from view the possibility that there might exist a *plurality* of forms of political apparatuses, of which the Persian Shahdom or the Ottoman Sultanate could be. The modern legal state form is then the crux of the depoliticizing political consensus of modernity. Because of the hegemonic centrality of this form of ideology, that of statism and its modes of operation (secularism, for example), we are rendered incapable of understanding the ontological dimensions that are at play in the political field, and thus of actually thinking the meaning of the political in international law.²⁸⁷ In international legal liberalism, the state must be the ultimate point of reference, and thus negate the possibility of an overarching political praxis that might recognize other actors, or a set of politics that would not be centred on the state.²⁸⁸ Persia, because of its radical difference was then a rogue, a misfit to the international order. Modern liberalism, I have claimed, is incapable of conceiving of an order founded on a pluralistic political debate, of multiple ontologies interacting together.

The consequence of the modernist narrative then is that it negates the reality of Persia in international law; its cultural taxonomy, its way of life, its episteme and finally, its political ontology have no meaning in the normative process. Moreover, it also breaks Persia and the Islamicate world into the universalized history of the West. Persia did not only lose its ontological possibility, but lost its way of seeing and understanding the world, its episteme and hermeneutical frame of reference. As I have argued in sub-section 1 of Chapter 2, capitulations provided the means for imperial power to deny the sovereign power of Persia when it came to its legal and jurisdictional capacity. As Westlake argued, “Europeans or Americans in [Oriental societies] form classes apart, and would not feel safe under the local administration of justice which, even were they assured of its integrity, could not have the machinery necessary for giving adequate protection.”²⁸⁹ The specific and localized laws of the Orient did not meet the threshold that informed the political consensus of modern Western legal systems, and capitulations were the right means to rectify this situation and supplement the fallible legality of the lands of Islam.

²⁸⁷ *Ibid* at 10.

²⁸⁸ Schmitt, *supra* note 48 at 70.

²⁸⁹ Westlake, *supra* note 139 at 102.

Moreover, as it was argued in sub-sections 2 and 3, the structure and the rationality of Persia were both lacking, and needed to be improved if the Islamicate polity was to ever become a sovereign equal to Europeans. First, in a fashion that referred to the reflections of Max Weber on the Oriental “sultanist” mindset (and to an extent to Marx’s “Oriental Despotism”), capitulations were to supplement the Oriental traditional lack with the mode of thinking of European economic rationality, based on the individual’s right to private property. In that sense, the lands and resources of Persia had to be open to appropriation by imperial companies that would optimize the Persian irrational usage and trading of resources. Free trade, given effect by imperial powers and the quasi-sovereign power of their companies in the lands of Persia, was a central principle of the liberal cosmopolitan dream; it sought to open the world to the modern legal conception of private property. Moreover, the process of commodification of the lands and resources of Persia was a central catalyzer for the expansion of ideological political consensus of liberalism. Indeed, the Western system of private property required the protection of the assets acquired by foreigners in Persia, and by the new modernized Persian intelligentsia, under a modernized state apparatus. The bourgeoisie required the import of legal positivism, which, in Persia, concretized in the first Constitutional revolution (*Mashruteh* movement) and its rejection of the Islamic legality of Persia. This new movement, and the third instalment which I described as the nationalization process in sub-section 3 of Chapter 2, were articulated in the idioms of private individual rights and contracts, given effect through the definition of the new Iranian nation and its development of a Being centred on the state.

The common denominator of this research I wish to emphasize here is the epistemicidal and ontologicidal nature of international law, and thus of the modern/colonial project. What I mean is that through the universal claims of modernity, the technologies of international law I have studied have sought to homogenize the language but also the worldview, and thus the very Being from which one interacts with and sees the world. International law, I have claimed, sought to redress the radical ontological differences that could destabilize the liberal political consensus at the roots of modernity. International law, at its very core is a set of rules that derives from this political consensus. However, this framework of rules is premised on the idea that its actors cannot voice their grievances from their own “understanding of the world”. Indeed, the only way

that Persia could voice its grievances against western imperialism was by falling prey to the global ideological apparatus of modernism and the state. What it saw as imperialism was rather a necessary step towards sovereign equality, or so was the modernist argument. The central normative claim that international law proposes then is a universalization of the project of modernity, and its underside, the colonial matrix of power and its eradication of the ways of Being of the non-European Other.

The Western project, through international law, sought to establish a language that would enable the world to be understood in its totality²⁹⁰, but from an epistemic perspective located in the West. The concept of the nation-state, of the technologies of the law such as capitulations and concessions, only make sense when read in conjunction with the modern Westphalian myth and the specific history of Europe. While this is not a new claim (Theodor Adorno and Max Horkheimer convincingly argued similarly about the myth of modernity decades ago²⁹¹), the field of international law has largely remained sheltered from such critiques²⁹². I would claim that this is because of the epistemic privilege that modernism has held over the normative process, as a global ideological apparatus. Modern international law was this project, a sort of “Tower of Babel”²⁹³, which sought to subsume the whole world under a hubristic truth-claim based on the European experience.

The submission of Persia and later Iran was firstly brought about by a series of military conquests, a repressive apparatus that then gave Europe the capacity to impose its legal technologies, the ideological apparatus, on Persia. It is those technologies that formed the spearhead of the modern global ideological apparatus of modernism, allowing it to attain the level of pervasiveness that later allowed it to claim a global consensus on its principles. The establishment of this consensus on language then clarified that any theoretical investigation against the West such as the voicing of anti-imperialist grievances, would have to be done in the language provided by international law. The Islamicate, because it was denied by the modern

²⁹⁰ Salman Sayyid, “After Babel: Dialogue, Difference and Demons” (2006) 12:1 Soc Ident 5 at 7.

²⁹¹ Max Horkheimer & Theodor W Adorno, *Dialectic of Enlightenment* (New York: Continuum, 1994).

²⁹² I do think that Peter Fitzpatrick’s engagement with the question has however led to some very convincing and interesting arguments; Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992); Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001).

²⁹³ For an enlightening discussion on the Judaeo-Christian myth, the production of language, and its relation to the Modern project, see Sayyid, *supra* note 127 at 18; Sayyid, *supra* note 290 at 7.

project, lost its capacity to voice its worldview under the consensus of Western modernity.

It is this loss of ontological capacity that I have proposed produced an ontological self-Orientalization of the reality of Persia/Iran, and more broadly, of the zones of exception of the Islamicate world. To do so, as I have argued, the modern project locates the backwardness to the development of societies by displaying their very Being as something divergent from modernity, as a step that lays in a historical past whereas modernity, and the legal development it entails lie in the future. It is the Other's absolute cultural incapacity to partake in the benefits of modernity that is perceived as radical otherness²⁹⁴, hiding modernity's epistemic and ontological capacity to name and create otherness through its technologies and modes of operation by dominating the Other. The effect is then to force the Other in a self-loathing akin to the self-alienation imposed on the by the misrecognition of the colonial master in Fanon.

My inquiry has sought to prove that the project of modern international law suffers from this exact same bias, which inflicts a form of "coloniality of Being" on the polities and people on the wrong side of the imperial divide. This coloniality of Being, in the case I have analyzed of Persia/Iran and more broadly the Islamicate world at the turn of the 19th century, has led to the development of clear sentiments of self-loathing, and the creation of new classes and discourses that were directly derived from the Western experience. The new categories of the bourgeoisie, imported through the legal technologies put forward under repressive duress by the imperial powers, which I have briefly sketched out, had one goal in mind; the eradication of the "backwardness" and "tradition" of Persian/Iranian society. I have argued that the expansion of international law to those imperial and colonial zones of exception was not merely a dynamic effect of imperial reality, but rather a direct means of translation of the modern/colonial project through its modes of operation and technologies. International law's objective follows the project of modernity/coloniality, namely to produce a world in which "all surviving cultures have to rewrite their own history and live up to that of the West."²⁹⁵

²⁹⁴ Chantal Thomas, "Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development" (1999) 9:1 Transnational Law & Contemporary Problems 1 at 8.

²⁹⁵ Tayyab Mahmud, "Postcolonial Imaginaries: Alternative Development or Alternatives to Development?" (1999) 9:2 Transnational Law & Contemporary Problems 25 at 28.

What I have sought to argue was that this two-sided project suffers from a central, critical instability²⁹⁶. The Eurocentric modern project is unstable as its mode of operation is a critical threat to its very existence (it is immanently critical), in the sense that it acts contradictory to its claims, but also in that this instability is a constitutive element of the project. The immanent critical side of the project stems from its underlying modern rationality and its claim to universalism and the cosmopolitan modern project. As I have proposed, the project of modernity maintained the central epistemic power to define the rules of international law through its position as a hegemonic political claim. It is however this very domination of the Other through the various technologies and modes of operation of international law that allowed modern international law to contain its own instability by hiding it from sight. What I mean by this is that capitulations, concessions and statism have hidden from our sight the foundational political violence that shows the contradiction of the project of modernity, making this political violence a natural movement towards modernity. The instability of the project is then precluded by the imposition of the ideological consensus of modern international law through its technologies, which then have the effect of eliding the foundational ontologicide I have discussed. Epistemic domination then allows the hegemonic political ideology (liberalism) of the modern project to appear both liberating and universal, but neither unstable, nor as a vector of imperialism.

International law then refuses the actual plurality that exists in the world, in favour of its single monological self-referential system, its “hubris of point zero”, a mode of operation that gives international legal knowledge an ethereal location outside of its geopolitical Eurocentric origin.²⁹⁷ As I have proposed above, there is then a wide discrepancy between international law’s claim to universality, and its actual Eurocentric foundations, its promise of sovereign universal equality, and its factual embedding with the project of modernity/coloniality. International law is then oscillating between a claim to universality and its foundational bias giving epistemic privilege to the norms, doctrines and institutions that have evolved from its Eurocentric historiography. This ambivalence points to the contradiction in the universalist promise of the

²⁹⁶ I draw inspiration on this concept of “critical instability” from; Fitzpatrick & Tuitt, *supra* note 79 at xi–xx; Pahuja, *supra* note 79 at 25–37.

²⁹⁷ On this see amongst others Santiago Castro-Gómez, “The Missing Chapter of Empire” (2007) 21:2-3 *Cult Stud* 428; Santiago Castro-Gómez, *La hybris del punto cero: ciencia, raza e ilustración en la Nueva Granada (1750-1816)* (Pontificia Universidad Javeriana, 2005); Walter D. Mignolo, “Epistemic Disobedience, Independent Thought and Decolonial Freedom” (2009) 26:7-8 *Theor Cult Soc* 159 at 8.

project of modernity. Mignolo, as I have briefly described, has convincingly argued that the project of modernity could not be separated from its darker side, that of the colonial matrix of power. International law is not merely a set of formal substantive and procedural rules that have been found out of the practice and opinion of states. Rather, it is a set of reified normative standards that enforce the specific developmental model of the European experience. Normatively, international law is based on a consensus around the universality of this experience and of its norms, what Carl Schmitt apologetically called the *Nomos of the Earth*.²⁹⁸

Following Anghie, I come to the conclusion that the project of modernity/coloniality “shaped not only those doctrines of international law explicitly devised for the very purpose of suppressing the Third World [in my case, the East, the Islamicate world], but had also profoundly shaped the very foundations of international law, including the ostensibly neutral doctrine of sovereignty”²⁹⁹. Moreover, international law, under the global ideological apparatuses of the modern project, has developed tendencies to commit “ontologicide” by favouring forms of institutions and governance over others for the voicing of agency. The “modern” state of the East, even before the era of decolonization and development, had sought to reform its institutions and models to follow those provided by the West through capitulations, concessions, and statism. As it was demonstrated in Chapter 2, elites of the South have been instrumental in this project through their internalization of self-Orientalism, considering their very Being to be inferior. Ontologicide has then been the effect, in this dynamic, of the replacing of the ontological and political Being of the East or Islamicate by one that sought total emulation of the Being of the West. The creation of the “nation” and of the repressive and ideological apparatuses of the modern state in Persia led to the dismissal of its Islamic cultural taxonomy.

To conclude, I would submit that this inquiry points us to where we can look to understand and transcend the debate on the question of Eurocentrism. As I have argued, neither an understanding only of the political, or of law separately can allow us to grasp the deeper meaning of the dynamics underlying both perspectives. “Agency is not discovered by identifying the legal in the lived. It is rendered visible via attentiveness to the lived.”³⁰⁰ In that sense, agency

²⁹⁸ Schmitt, *supra* note 120.

²⁹⁹ Anghie, *supra* note 97 at 748–749.

³⁰⁰ Macdonald & Sandomierski, *supra* note 63 at 622.

is not an affair merely of politics, of the political, or of the legal principles; it is a question that has a rooting in the very ontology of an actor. Understanding ontology, here of the situation in Persia/Iran and its relationship with the West, requires “attentiveness to the lived”, to the “corporeality” of actors as not merely an affair of the foreseeable politics, or legal principles given to us.

What my inquiry has sought to show is that ontology and its epistemic frame, its hermeneutic frame of reference, can be denied. In that sense, the understanding of the relationship between Persia and the West, even if the frame we want to focus on is that of the law, requires that we conceive of the subject in its very own Being, here, in its ontology informed by Islam, and the relationship between Islam and the Western modern project. This entails a fundamental recognition that law is not simply an affair of given, reified and sedimented norms based on a political consensus, but rather to see it as a relationship. Indeed, as I have contended, a political consensus can conceal deeper relations under which the reality of a normative dynamic can be hidden. Law is a relationship between actors, but more importantly, between epistemic frameworks. My goal here was to recover the foundational political antagonism, the inter-relational normative reality that founded the political consensus that informed the West/Persia legal network, and to unearth the foundational political violence at its roots.

As a concluding reflection, I would propose that international norms are relations, and the concretization of a relation between subjects. This, I claim, is the fundamental political violence that is elided by the legal manifestation of the project of modernity/coloniality; one pole of the relations is severed from that same relation as if it existed only in a distant past, and can thus exist no more. Processes of human interaction are infinitely more varied than those suggested by a myth of law that gives priority to legislatively announced claims of right by recognized legal actors and judicial adjudication of these rights.³⁰¹ This perspective proposes that “the self is an irreducible site of internormativity”³⁰². Recognizing the relational character of normativity in this way allows us to reconcile the *nomos* with the subjectivity that is obliterated from the modern project, and to reunite our conception of international law with a normative pluralist reality.

³⁰¹ Martha-Marie Kleinhans & Roderick A Macdonald, “What is a Critical Legal Pluralism?.” (1997) 12:02 Canadian Journal of Law and Society 25.

³⁰² *Ibid* at 39.

From this perspective, the emphasis is on the constructive capacity of a self in relation with other constructed selves.³⁰³ This could refer to what Panikkar and Mignolo have called “pluritopic hermeneutics”, or the consecration of a possibility of interactive knowledges from dynamic individual and collective actors.³⁰⁴ This method seeks to reconstruct epistemology (especially against its epistemicidal variance) by “stress[ing] the social, political and ontological dimensions of any theorizing and any understanding, questioning the Western locus of enunciation masked as universal and out-of-concrete-space”, and to account for the differences in positions of enunciation of (normative) knowledge beyond the cultural relativism that was inherent to (Eurocentric) modernity, as this thesis has shown in the case of Persia.³⁰⁵

This critical legal pluralism, instead of seeking a submission of normative knowledges by others under unilaterally-defined epistemic criteria (“rationality”, “objectivity”, etc.), accepts law-making and normative knowledge as processes of self-definition and self-understanding founded in differing narratives that are coeval. Knowledge and law-making is about “creating and maintaining myths about realities”³⁰⁶, and a critical legal pluralism “seeks neither a separation, nor an eventual hierarchical reconciliation, of multiple legal orders.”³⁰⁷ The heterogeneity of normative knowledges is a fact that exists both between normative regimes that inhabit the same hermeneutical space, but also within the regimes themselves. The way subjects/objects of myths react to such relations contributes to their own self-understanding; the way modern international law relates to other epistemes and ontologies is highly representative of its self-understanding. A critical legal pluralism allows us to grasp the underlying critical instability that lies at the core of the myth of the modern liberal normative order, as through this perspective we learn to account for the corpo-reality of the actors that, by their very existence, unsettle this order.

³⁰³ *Ibid.*

³⁰⁴ Raimundo Panikkar, *Myth, Faith and Hermeneutics. Cross-Cultural Studies*. (New York: Paulist Press, 1979) at 8–9; Walter Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges, and Border Thinking* (Princeton: Princeton University Press, 2012) at 17; Madina Tlostanova & Walter Mignolo, “On Pluritopic Hermeneutics, Transmodern Thinking and Decolonial Philosophy” (2009) 1:1 Encounters 11 at 16–18.

³⁰⁵ Mignolo, *supra* note 304 at 18.

³⁰⁶ Kleinhans & Macdonald, *supra* note 301 at 39.

³⁰⁷ *Ibid.*

This inquiry into the legal history between Persia and the Western imperial world has, I think, raised many questions that constitute interesting avenues for further research. After the period I have described, and as a result of the failure of imported secular models that have negated the realities of the Islamicate world, many Muslims questioned the reliance of the Islamicate world on foreign practices. Rather, they started revisiting their own personal Being in a quest for answers to an ever more encroaching liberal modernist order. Among those, in Iran, we see names such as Jalal al-e Ahmad, ‘Ali Shari’ati, and Ayatollah Khomeini, all of whom had a central role to play in the events that led to Islamic Revolution of 1979. Considering the events of the Islamic Revolution, the question has hardly been asked in international law whether the process itself had any significance for international law. While the International Court of Justice was questioned with regard to the Tehran hostage crisis, the Iranian government decided to contravene the generally well-accepted principles on diplomatic protection, and to ratify the actions of the students. Furthermore, after the revolution, the Iran-U.S. Special Claims Court was created by the two states as a means to solve their disagreements with regards to the revolutionary moment. The tragic events of the Iran-Iraq war, and the legal rationale of both parties were also highly tied to the revolutionary moment in Iran. While I will name only those few instances, it can hardly be maintained that the Revolution did not play a central role in international affairs and incidentally in international law. The question then remains as to the theorization of this revolutionary moment, especially with regards to Iran’s past in relation to the Imperialism, which I have discussed in this thesis.

One central question that comes to mind is that of the “return” to an ontology informed by Islam. Does such a return have any re-politicizing and revivalist effect against the epistemicidal and ontologicidal structure of modernity? In other words, the question I would like to ask in closing this essay is whether or not a return to, or a redefinition of a negated ontology and episteme could enable the reframing of international law. Can the redefinition of a negated ontology provide answers to the problems raised by imperialism throughout the “Long 19th Century”, problems that, if we consider our international system to still be premised on liberalism and modernity, still unsettle international law. In other words, would a recognition of an international legal agency marked by, for example, a political understanding of Islam, have any usefulness in righting the wrongs of the modern international legal system.

The reason why I am asking this question is certainly not to propose a rejection of the international legal system, but rather for a realization of the actual goal of international law; a mitigation of conflicts between societies, but without the ontologicidal effects of the modern paradigm. As we have seen in the second half of the last century, the promises of international law have had a hard time making up to their commitments, especially in the so-called era of the “postcolonial” state. It is my claim that moving our understanding of the law towards one based on a critical legal pluralism could alleviate the instability of the normative system. Normative orders exist through the creative capacity of their subjects, and their interactions.³⁰⁸ The required shift here then is one that will portray law, and international law, in the words of Clifford Geertz, not as machinery, but as meaning, as a “mode of giving particular sense to particular things in particular places”³⁰⁹, and away from one centred on a single actor, the state, as the sole universal locus for the formation of norms. This is a shift from law as truth, to law as a form of hermeneutic thinking, of how a subject perceives itself and the world and how this is negotiated inter-subjectively.

A critical legal pluralist inquiry mitigates the project of modernity, and while not entirely rejecting it as it would play in the same logic as the modern Eurocentric order, it builds from modernity a pluralistic, pluritopic perspective. The challenge levied against modernity then is both epistemic and ontological. By delving into the dynamic of relational construction of normative orders, it situates itself into the interpretations of law and hermeneutics of the Other, its corpo-reality, and away from those endorsed by officials, and actors of international law. Normativity is a relational phenomena that can be found within all members of any society, forming layers and networks of legal norms that most of the time do not follow the official normative lines provided by legal actors such as the state. Normativity, by its very relational nature, transcends borders, and transcends the “cut” made by the state. This is why a study of international law as merely a study of states misses huge fragments of the normative reality.

³⁰⁸ *Ibid* at 40.

³⁰⁹ Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 232; Kleinhans & Macdonald, *supra* note 301 at 42.

Considering international law as a shared normative process, as some have argued that Muslims have originally welcomed the normative order as it did not contradict the basic principles of their own “international” normative relations³¹⁰, can lead, I presume, to a transcending of the ontologicidal project of modernity. Islam is a factual variable of the world system and its many societies, and with the growing Muslim population, especially in South-East Asia, one that is to stay. I do not claim that Islam and modernity are incompatible, neither, for that matter, that they are any compatible either. I merely want to reframe that from a pluralist perspective on international law, both the modern Eurocentric and the Islamicate constitute legal *loci* that interact together and form what we call this global order. Muslims, as individuals and as a community, and the Muslim/Islamic states are at least partly determined and structured through Western modernity and Western imperialism and vice versa. From an ontic focus then, Islam is fundamentally entwined in the web of politics of the current modern liberal political consensus. It is however the ontological possibility of Islam that is not considered in this scheme and cannot be voiced through its rules for the settlement of grievances.

It then comes as no surprise that still today, for the proponents of a political form of Islam, violence is often the way to voice claims against the technologies of international law that have relegated them to their status of bare life, and ontological negation. Fanon, while careful as to his words, believed that anti-colonial violence was the way out of the Black slave’s wretchedness.³¹¹ From the Islamic Revolution of 1979 and the rejection of the rules on diplomatic immunity and the jurisdiction of the ICJ, to the Palestinian or Syrian fighters who trace their damnation of the last century to the Sykes-Picot accord, international law has been and is still to this very day very often the center of objections and accusations of the non-Western world against the West. I believe that understanding the question of how international law understands Islam and vice versa rests in methodology, and with the hermeneutical possibility of understanding the world as a pluri-verse, against the modern uni-verse.

This methodological perspective then requires us to de-link from Western modernity, but not necessarily from modernity altogether. This de-linking also requires that we revisit,

³¹⁰ Maurits Berger, “Islamic Views on International law” in Paul Meerts, ed, *Culture and International law* (The Hague: Hague Academic Press, 2008) 105.

³¹¹ Frantz Fanon, *Les damnés de la terre* (Paris: F. Maspero, 1982).

reconsider and repoliticize the intellectual and conceptual categories that were depoliticized. We must bring the theoretical and political struggles that challenge the structures of power to the fore, and then recreate new political concepts that break from the Western cast. In that sense, I think that the categories that were developed by Ayatollah Khomeini and ‘Ali Shari’ati in the context of leading to the Iranian revolution, that of the *ummah*, the community of the believers, and the *mustazafin*, the oppressed of the earth as prevalent legal actors, bear this capacity to unsettle the hegemony of the modern liberal paradigm, and mitigate and reframe its instability. I think the redefinition of such concepts bears substantial importance to understand lessons from the last century, and to find answers for the 21st.

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