Legitimating Revolt: Classical Legal Thought and the Birth of Political Islam

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Scholars typically identify the Tobacco Movement in Nineteenth-Century Iran as the key moment when the ulama, or Muslim clergy, emerged as a political force. While theorists have suggested that religious reform or the Marxist class struggle caused this event, these explanations fail to account for the Movement’s emphasis on the will of the individual, the need for systematized laws, and the involvement of women. These attributes are hallmarks of Classical Legal Thought, the dominant legal consciousness of the era. Two key reformers, Sayyid Jamal ad-Din (“Afghani”) and Mirza Malkum Khan (“Malcom”), used the language of Classical Legal Thought in painting the revolt as a step in legal codification. This maneuver lent credibility to later Constitutional revolts and advanced the notion that Iran belonged to the Family of Nations. This analysis furthers our understanding of Classical Legal Thought and its possible impact on nineteenth-century political Islam. This novel approach suggests that the origins of political Islam in Iran were more closely linked to Western legal norms than previously believed.

The so-called Arab Spring and the continuing internal struggles of the Islamic Republic of Iran have once again focused Western attention on political Islam. In the face of the victory of Islamic parties in the Egyptian elections, commentators have fretted over a supposed incompatibility of western and Islamic political systems and underlying legal principles. This analysis is colored by an intellectual climate steeped in the Orientalist tradition, where the exotic and atavistic east plays foil to the functionalist west. A reexamination of our conception of Middle Eastern politics is vital as the region struggles to entertain both democracy and Islam, a contradiction in the minds of many.

This paper adds to an increasingly important body of scholarship regarding Near Eastern historiography. Analysis of one the earliest moments in political Islam, the Tobacco Protests of Qajar Iran, has focused on the historical accuracy of contemporary accounts and political motivations of institutional actors. This piece focuses instead on the reframing of the movement by Iran’s preeminent legal reformers, as a reception of Classical Legal Thought with the clergy as protectors of the legal order. This exploration reveals important shared characteristics of Classical Legal Thought in both the Western and Islamic tradition, thereby providing an analytic tool for cross-cultural comparison.
The Tobacco Protest was a seminal moment in Iranian history. In 1891–92, a nationwide boycott of tobacco and widespread popular revolt forced Naser Shah to cancel a Regie, or concession, which would have awarded a monopoly for all tobacco sales to a foreign adventurer. Naser Shah’s stunning reversal revealed the domestic weakness of the Qajar dynasty and also signaled the entry of the ulama, or Islamic scholars and jurists, into the political realm. These elements would combine thirteen years later to influence the Constitutional Revolution of 1905.\(^1\) The conception of the tobacco movement as a successful ulama-led revolt announced the power of political Islam in Iran, a topic of obvious modern concern.\(^2\)

Although the success of the tobacco movement is conventionally ascribed to the involvement of the ulama, numerous commentators have put forward other possible factors influencing the movement’s ultimate result, for example, Russian Influence and Marxist class struggle. However, to date no author has examined the possible influence of the reception of Classical Legal Thought by the modernizing, disaffected Iranian elite.

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\(^2\) *Id.* It is difficult to overstate the importance of the Tobacco Movement in the eyes of Iranian Islamic scholars. These scholars draw a direct connection between the new role of the ulama first assumed in the Movement and the later Constitutional and Islamic revolutions. *See generally AQIQI BAKHSHAYISHI, TEN DECADES OF ULAMA’S STRUGGLE* (1985). According to this view, Mirza Shirazi and Sayyid Jamal ad-Din embody a tradition of political struggle by the ulama against colonialism and despotism that reached fruition with the success of Ayatollah Khomeini. *Id.* at 14 – 15. The Tobacco Movement serves as the archetype for cyclical revolts: while the individual actors may change depending on the historical period, the role of the ulama as the opponents of domestic and foreign tyranny remains constant. *Id.* at 13.
Scholars have conceived of the movement, successively, as a religious uprising inspired by foreign intrigue, an act of class-consciousness by a threatened merchant stratum, and the beginning of a budding feminist movement, which would contribute to and be subsequently betrayed by the constitutional and Islamic revolutions. Though each of these approaches to the Tobacco Movement has produced a richer understanding of one of the most important moments in modern Iranian history, they have not fully answered important questions regarding the Tobacco Movement and its immediate aftermath.

Why would a liberal elite frame an argument against an economic concession in almost purely religious terms and then claim the country was engaged in legal reform? Why would various factions of the ulama agree to join in economic protests that it had eschewed in the past? Why would women, who heretofore had been conspicuously absent or excluded from political protests, suddenly find themselves with a prominent role in the tobacco movement? The answer to these questions may become clear from analyzing this movement as a reception of Classical Legal Thought: that is, a semi-periphery nation recast an international economic issue as an intrusion in the domestic

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6 Id.; Parvin Paidar, Women and the Political Process in Twentieth-Century Iran, 50-51 (1997).
sphere of religion, while simultaneously reframing the protest as a movement for a
codification of laws. In so characterizing the tobacco movement, reformers recognized a
need for legal reform in Persia and signaled to the ulama that religious figures would
have a privileged role in this reform. Women would provide a resource for national
identity and regional superiority to the west, while preparing the next generation for
cultural advancement. These legal maneuvers comport with Classical Legal Thought --
the dominant legal consciousness of the time period which emphasized the systematic,
universal nature of private law based on contract and the *volk*-centered exceptionalism of
family law.

This paper argues that although the historic record of the Tobacco Movement is
murky, there is evidence that Classical Legal Thought influenced not only the Movement
but also the later European interpretation of the Movement. In particular, two reformers,
Sayyid Jamal ad-Din (“Afghani”) and Mirza Malkum Khan (“Malcom”),7 published
contemporary attacks on Naser Shah’s concession using argumentation in the classical
vein. During the revolt and in its immediate aftermath, these figures worked to frame the
movement as a quest for legal reform and social modernization. In their efforts to
modernize Iran, both men praised the example of Japan, which had fully embraced
Classical Legal Thought. They further argued that if reforms were couched in Islamic

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7 “Although the exact influence of Malkam Khan can no more be measured than that of
Afghani, it is clear that both had a considerable following . . ., both had many prominent
friends in Iran. The Shah was very afraid of both and repeatedly asked the English
government to expel both from England, to suppress [the newspaper] *Qanun*, and to aid
in preventing the entrance of their works into Iran.” *Keddie, Tobacco Protest*, supra
ote note 3, at 27. Different authors use variable spellings and names for these two
individuals. Due to the fact that this paper focuses largely on publications in Western
newspapers, I will use the names these men employed in British publications.
theology, Iran could follow Japan’s example and adopt a robust code of laws. The emphasis on legal reform was especially important because Iran could enjoy the limited protections of International Law only by first adopting European legal norms (which at that time comprised Classical Legal Thought) and then gaining admission into the Family of Nations. Malcolm and Afghani’s efforts to frame the revolt as a symptom of internal reform were at least partly successful in that later Orientalists viewed the Tobacco Movement as an expression of political public opinion. This perception in turn served as important precedent for liberalization by legitimating Iran’s Constitutional Movement in the eyes of the West.

Part I of this paper presents a brief overview of the foreign policy of Qajar Iran and a discussion of the practice of granting concessions, and then provides a description of the tobacco concession and the revolt that prompted cancellation of the Regie. Part II presents a portrait of two important reformers during the Tobacco Movement: Afghani and Malcom. Part III recounts the traditional and modern historiography of the Movement. Part IV presents Classical Legal Thought as an alternate explanation and details the attempt to frame the movement as legal reform. Part V explores the repercussions of this framing and presents questions for further exploration.

I. BACKGROUND- QAJAR IRAN, THE REUTERS CONCESSION, AND THE TOBACCO MOVEMENT

The foreign might of Iran had been in steady decline since the mid-17th century. Though never colonized, Iran lost a large amount of her Central Asian territories to the expanding Russians and much of her financial independence to the British. Iran’s precarious survival required the balancing of these two powers, with ever rotating pro-
British and pro-Russian viziers and policies. Iran was perceived as a semi-peripheral power.\(^8\) While the Qajars made some half-hearted attempts at modernizing reforms, the decentralized nature of Qajar society and foreign pressure to stifle domestic industry doomed these measures. Instead, the Shah’s advisers relied on concessions to spur growth.

The tobacco concession grew out of the comic misrule of Persia. The luxurious lifestyle of the Qajar Shahs\(^9\), coupled with the growing power of the Russians to the North\(^10\) and British to the East,\(^11\) placed Iran at the mercy of European concessionaires.\(^12\)

\(^8\) THOMAS SHANNON, AN INTRODUCTION TO THE WORLD SYSTEM PERSPECTIVE 29 - 31(1989).

\(^9\) Rulers of Iran from 1794 to 1925. See generally Ervand Abrahamian, Oriental Despotism: The Case of Qajar Iran, 5 INT’L J. MIDDLE EAST STUD. 3-31 (1974).

\(^10\) The Persian defeat in the 1804 Perso-Russian war resulted in the humiliating Treaty of Gulistan and the loss of any claim to Daghestan, Georgia, and Abkhazia. JOHN F. BADDELEY, THE RUSSIAN CONQUEST OF THE CAUCASUS 90 (1908). The Treaty of Turkmenchay, which brought a close to the equally disastrous 1826 Perso-Russian war, was similarly humiliating.

\(^11\) The Iranian was humiliated in the Anglo-Persian War of 1856, which resulted in Iran returning Herat to Afghanistan. Iranian reformers would often point to India as a reminder of the threat of Imperial Britain.

\(^12\) Concessions, at their most extreme, comprised a foreign monopoly on the domestic production of a good or service, typically granted for an annuity paid to the head of state. For example, a railway concession would entitle a foreign firm to be the sole provider of railway service in the granting country, in exchange for internal development and an annual fee. While concessions might have attracted foreign investment and developed internal infrastructure, all too often they were used as a tool of financial colonization. Foreign firms could present grossly unfair terms, with the implicit threat of imperial intervention if the terms were not accepted. Corrupt rulers could also use concessions as a means to increase their own personal funds without a direct tax increase on the domestic population. Concessions played a large role in the European control of Egypt and to a slightly lesser extent the Ottoman Empire. For an overview of the mixed results of Ottoman concessions, see generally, RODERICH DAVISON, REFORM IN THE OTTOMAN EMPIRE, 1856-1876 (1963). See Philip Ernest Schoenberg, The Evolution of Transport in Turkey (Eastern Thrace and Asia Minor) under Ottoman Rule, 1856-1918, 13 MIDDLE
These foreign financial adventurers provided the Shah’s court with an influx of immediate capital in the form of formal payments and informal bribes in exchange for long-term monopolies on national services. Foreign businessmen, typically backed by their respective governments, competed for enormously profitable concessions for the exclusive rights to manufacture, sell, or export such vital products as “wine, sugar, telephones, [and] electric light.”

While the Shah could typically grant concessions and mortgage the future resources with impunity, in 1872 he granted a transportation concession so outrageous as to engender revolt. The Reuter concession conferred “the exclusive right to finance a state bank, farm out the entire customs, exploit all minerals (with the exception of gold, silver, and precious stones), build railways and tramways for seventy years, and establish all future canals, irrigation works, roads, telegraph lines, and industrial factories” to Baron de Reuter. These terms were so grandiose that the Russian government demanded immediate cancellation, the British government considered Reuter’s scheme

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13 KEDDIE, TOBACCO PROTEST, supra note 3, at 8.

14 Mansoor Moaddel, The Shi‘i Ulama and the State in Iran, 15 THEORY AND SOC’Y 519, 528 (1986) [hereinafter Moaddel, Shi‘i Ulama].

15 Id. at 528.
unworkable, and the Persian people loudly protested. The Shah, faced with resistance both foreign and domestic, cancelled the concession on a technicality and removed officials who had engineered the deal.

A. The Tobacco Concession

In March, 1890, Naser Shah granted Major G. F. Talbot an absolute monopoly over the production, sale and export of tobacco. Because Sir Henry Drummond Wolff had introduced Talbot to the Shah, the royal court incorrectly assumed that Talbot was directly representing the British government. However, Talbot was merely trading on his connections within the British Ministry of Iran. A month later, Talbot sold the concession to a group called the Imperial Tobacco Corporation of Persia.

B. Importance of Reformist Newspapers and Foreign Appeals

Newspapers played a vital role in publicizing the humiliating terms of concessions. In July 1890, Malcom’s Qanun had a general complaint against the concessions granted to foreign adventurers. In November 1890, the liberal newspaper

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16 Curzon felt that "[t]he agreement contained the most complete surrender of the entire resources of a kingdom into foreign hands that has ever been dreamed of, much less accomplished, in history." ERVAND ABRAHAMIAN, IRAN: BETWEEN TWO REVOLUTIONS 55 (1982).

17 Shaul Bakhash, The Evolution of Qajar Bureaucracy: 1779-1879, 7 MIDDLE EASTERN STUD. 139, 159 (1971) (discussing how the reaction to the concession helped convinced the Shah to sack his prime minister Mushir ud-Dawleh).

18 The concession was a spectacularly bad deal, even as concessions go. The concession holder paid only £15,000 per annum. By contrast, a similar Turkish concession paid £630,000 pounds annually. KEDDIE, TOBACCO PROTEST, supra note 3, at 39

19 KEDDIE, TOBACCO PROTEST, supra note 3, at 44

20 Id.
Akhtar excoriated those responsible for the tobacco concession. The document provided the details of the concession, informing the Persian public of the threat of foreign economic domination in a vital field. Further, the article referred to research in the Turkish newspaper Sabah, which purported to show that the annuity for the concession was far lower than similar concessions in Ottoman lands. The newspaper was banned in 1891, on account of a follow up piece criticizing the widespread grant of concessions in Persia and the lawlessness and corruption which they evinced. The article noted: “A country that has no laws to govern authorities will soon be abandoned…. Foreigners have held Bank, Railway, and tramway concessions in our country for some time [while the European powers] cannot obtain such concessions [in other territories] . . . in spite of their influence…” Although Naser Shah formally banned both of these publications, they were widely available. The Shah was “also greatly upset by the continued wide circulation in Iran of . . . Qanun, and by Malcom’s treasonable correspondence with several leading Persian statesmen.”

21 Id.
22 Id.
23 Id. at 45.
24 Hitoshi Suzuki, A Note on the Jan. 20, 1891 Akhtar Article Concerning the Persian Tobacco Concession, 1 ANNALS OF JAPAN ASSN. FOR MIDDLE EASTERN STUD. 310, 310-31 (1986).
25 KEDDIE, TOBACCO PROTEST, supra note 3, at 45.
26 Id. at 53.
The government did not formally announce the tobacco concession until February 1891. The conduct of Regie agents enraged the public. The British Oriental Secretary, T.E. Gordon, noted that the heavy-handed tactics of the agents would surely backfire: “An imprudent beginning was made in exercising the right of search in a manner which alarmed some people for the privacy of their homes.” The council of ministers begin to grow uneasy and began discussing the possibility of cancelling the concession, but Naser Shah.

Newspaper articles critical of the concession soon began appearing in Western newspapers. An article in the Financial Standard 1891 March 7 1891, predicted that the Persian people would not accept the concessions: “It appears that Persian statesmen have allow themselves to be allured for this concession, as, indeed, for many others, beyond the limits of what they could and should have conceded. . . . It will create for the Persian government a thousand and one difficulties.”

Protestors inside Iran posted anonymous placards warning that inaction would lead to foreign domination. The reformers recognized that internal was necessary to stave off foreign interference. Indeed, Iran needed only look to its neighbors to observe the foreign imposition of law. Agitators against the tobacco concession focused on the British threat, “Before you become the slaves of the foreigners like the natives of India you may find a remedy. . . . the [ulama] have always protected the religion should you

27 Id. at 50.
28 Id. at 50 (quoting T.E. GORDON, PERSIA REVISITED 27, (1896)).
29 Id. at 52.
show any energy they are ready to help you.”

However, the designs of Russia were not forgotten. “Iran is one of the few countries of Asia which still has no laws, which have been pushed even into Bokhara on Russian Bayonets. Iran should get laws, and it will be done either internally or through foreign conquest. Form assemblies with the goal of effecting reform. We do not desire to invent new laws. Our desire is that our learned people and the chiefs of our religion may meet together and have the laws of our God carried out the proper way.”

C. Involvement of Women

In a marked change from the usual exclusion of women from Iranian politics, women played an important role in the Tobacco Movement. Ibrahim Taymouri, the author of The Tobacco Boycott noted, “Women's perseverance in this movement was such that when the ban on tobacco was announced, women led the protesters who marched toward Nasser od-Din shah's palace. As they passed through the bazaar, these women closed down the shops, igniting a city-wide strike.” A popular story is that during the boycott of tobacco, the wives of the Shah refused to smoke, as “tobacco has

\[30\] Id. at 47.

\[31\] Id. at 53-54.

\[32\] It should be noted that Babi women did take an active role in organizing protests and feeding imprisoned Babis. See Moogan Momen, The Role of Women in the Bahai Community, in RELIGION AND SOCIETY IN QAJAR IRAN 346, 365-66 (Robert Gleave ed., 2005).

been boycotted by those who has married us to you.”

Crowds of women also attacked an official when they learned of an attempt to exile Mirza Ashtyani, one of the leaders of the protest.

_D. Initial Apathy from the Ulama and the Disputed Fatwa_

In the early and middle stages of the movement, the ulama had not taken a single coherent view of the concession. Instead, merchants and small businessmen championed the cause. The British consul reported, “I am informed from the most reliable sources that it is not true that the Mollahs have been preaching in the mosques against the Regie.”

Rather, it was “in the bazaar and in private houses it is the all-engrossing subject of conversation.”

The movement fought to gain ulama approval, often unsuccessfully, as in the case of Shaykh Muhammad Rahim, who considered “obeying the orders of the Islam protector shahanshah” his necessary duty. Indeed, many placards threatened ulama who would not condemn the concession.

In December 1891, a fatwa attributed to Hasan Shirazi banned the use of tobacco by any Muslim. A nationwide boycott of tobacco followed. The fatwa read:

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34 TEYMOURI, _supra_ note 33, at 106-08.
35 PAIDAR, _supra_ note 6, at 51.
36 Moaddel, _Class Mobilization, supra_ note 4, at 461.
37 _Id._
38 _Id._ at 463.
39 _Id._
40 _Id._ at 464.
41 KEDDIE, _TOBACCO PROTEST, supra_ note 3, at 95 – 96.
In the name of God the merciful, the forgiving. Today the use of . . . tobacco, in whatever fashion, is reckoned as war against the imam of the age (may God hasten his glad advent.)

Shirazi later stated that the fatwa was legitimate. However, it was likely written by a leading merchant, Malek al-Tojjar, and Mirza Ashtiyahni, a leading cleric in Tehran. However, Shirazi also sent the Shah a letter reflecting many of Afghani’s concerns and arguing for the end of the concessions.

The move, usually conceived as a way to strengthen the existing economic arguments put forth by the merchants, also bolstered important arguments favoring the protection of the domestic order. Foreigners in Iran appreciated this theme. The British reported that “fanatical mullahs preach against surrender to infidels, Europeans will gain land and Muslim women... [the mullahs say that] Musselman lambs are being devoured by European wolves. “

E. Shah backs down

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42 Moaddel, Class Mobilization, supra note 4, at 464.

43 Algar believes the fatwa to be genuine. Mirza Aqa Khan’s letter to Malcom, undated, mentions the forging of fatwas. “Some people here have the idea of requesting from Mirza Hasan Shirazi a fatwa on some matter or other, and then transferring his seal photographically to another piece of paper ...” HAMID ALGAR, MIRZA MALKUM KHAN: A BIOGRAPHICAL STUDY IN IRANIAN MODERNISM 213 (1973). [hereinafter ALGAR, MIRZA]. Moaddel, Class Mobilization, supra note 4, at 464, and Keddie believe the fatwa to be a forgery. Bayat follows Adamiyat’s interpretation and believes that the fatwa was a forgery and that local politics determined the actions of the ulama. MANGOL BAYAT, IRAN’S FIRST REVOLUTION: SHI’ISM AND THE CONSTITUTIONAL REVOLUTION OF 1905-1909, 19 (1991).

44 KEDDIE, TOBACCO PROTEST, supra note 3, at 57. There was a fear that non-Muslims would establish wheat plantations and begin wooing Muslim women.
In the face of widespread opposition and foreign pressure, and unwilling to face the popular repercussions of exiling Ashtiani and other protest leaders, the Shah cancelled the Regie. The Tobacco Company insisted on compensation for expenses incurred. While the British Government had no formal ties to the company, it served as intermediary and helped secure a payment of £500,000. The Liberals in the British Parliament reacted to this maneuver in disgust and horror.

Following the successful boycott, reformers petitioned Shirazi and other ulama to endorse other liberal causes. Clerical power became of supreme interest to the Shah, who summoned the ulama to Tehran and thanked them for “strengthening the foundations of the state.” Though the ulama began fighting amongst themselves to exercise their newfound influence, the political might of the religious sanction had been established. Just a few years later “[a]ppeals in religious terms, expressed by religious leaders, brought about the movement against the Qajar monarchy known as the Constitutional Revolution.”

45 Hamid Algar, Religion and State in Iran: The Role of the Ulama in the Qajar Period, 215 (1980) [hereinafter, Algar, Religion and State].

46 Keddie, Tobacco Protest, supra note 3, at 123.

47 Id.

48 Id. at 126.


50 Algar, Religion and State, supra note 45, at 218.

51 Id. at 220.

52 Id. at 221.
II. REFORMERS AND THE NARRATIVE OF THE TOBACCO MOVEMENT

Two important reformers who shaped the narrative of the Tobacco Movement were Sayyid Jamal Ad-Din and Mirza Malkum Khan Nazem al-Dauleh. Both had significant interactions with European jurists and both used the Western press as a tool for domestic reform. Though these men traveled very different paths, they each recognized Iran’s need for reform and modernization in the face of British and Russian aggression.

A. Sayyid Jamal Ad-Din al-Afghani: Pan-Islamic Anti-Imperialist

Sayyid Jamal Ad-Din al-Afghani (“Afghani”) was a central figure in the pan-Islamic movement and helped frame the Tobacco Movement as a demand for a legal code. He was born in or around 1839 in Iran, though he frequently claimed to have been born in Afghanistan. Afghani would have witnessed the reformist potential of Islam early in his life when the Babis, composed of elements the reformist Shaykhiyya school, attempted to overhaul social mores. In 1857, Afghani traveled to India, where


54 Id.

55 Followers of the Bab (the gate), Sayyid Ali Muhammad Shirazi, gained significant ground in Iran between 1844 and 1850, when the Bab was executed. The group began as a splinter from the Shaykhiyya school of Shi’i Islam. Denis MacEoin, Orthodoxy and Heterodoxy in Nineteenth-Century Shia’ism: The Cases of Shaykhism and Babism, 110 J. AM. ORIENTAL SOC’Y 323, 325 (1990) [hereinafter MacEoin, Orthodoxy].

he acquired his lifelong hatred of the British. In an effort to resist European Imperialism, Afghani argued that Muslims must embrace Westernizing reforms and present a united front against the European powers. In 1869, Afghani first traveled to Istanbul, where he acquainted himself with Tanzimat reformers, such as Safvet, Munif and Tahsin.

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60 Afghani joined the modernizing official Council of education and established ties to the Darulfunun during his stay, signaling his approval of the reformist movement. KEDDIE, SAYYID JAMAL, *supra* note 53, at 59.

61 Literally, “the reorganization.” The Tanzimat reform movement’s ultimate aim was to attain “sivilizasyon as seen through French eyes.” Ayşe Kadioğlu, *The Paradox of Turkish Nationalism and the Construction of Official Identity*, 32 MIDDLE EASTERN STUD. 177, 180 (1996). This involved proposed changes to political and civil life. The struggle to find a balance between Western modernization and cultural autonomy would be repeated in numerous Islamic states. Chatterjee argues that “ultimately the [reform] movements invariably contain both . . . a genuine modernism and a more or less spurious concern for local culture.” PARtha CHATTERjee, *NATIONALIST THOUGHT AND THE COLONIAL WORLD*, 51 (1993).

62 Minister of Education.

63 President for the Council of Education.

64 Director of the University.
Afghani was especially attractive to Islamic reformers because he championed a rational approach based on medieval Muslim philosophy and pan-Islamic cooperation. Afghani’s philosophical approach allowed reformers to rebrand Western methods as indigenous “reborrowings” of long-held, but recently obscured, Islamic teachings. Afghani’s teachings “exalted reason above literalist revelation” and “argued for

65 KEDDIE, SAYYID JAMAL, supra note 53, at 125 (“Afghani was able to inspire young intellectuals because he provided a bridge between their traditional culture and the acceptance of various more liberal, rational, and modern approaches - a bridge that came largely from his own philosophical and esoteric Islamic background.”). However, Blunt goes too far when he ascribes the entire liberal religious reform movement to Afghani. Id.

66 KEDDIE, IMPERIALISM, supra note 559, at 18, 38 (discussing Afghani’s desire to reintroduce interpretation of law and doctrine - *ijtihad*). For a greater exploration of Afghani’s emphasis on rational interpretation, his interest in falsafa (Helleno-Islamic philosophy) and Neo-Platonism, see id. at 45-49.

67 See KEDDIE, IMPERIALISM, supra note 559, at 162 - 65, (noting Afghani’s praise of philosophy and his belief that infinite interpretations of the Koran allowed Islam to apply rational methods to modern problems); KEDDIE, IMPERIALISM, supra note 559, at 21.

68 KEDDIE, IMPERIALISM, supra note 559, at 18. It is worth noting that Afghani’s greatest disciple, Abdur, used a similar methodology to resolve conflicts in Islamic law. Abdur’s goal of Islamic resistance to imperialism manifested in the demand for the unity of Islamic Law. See OUSSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 22 (2001). Along with Rachid Rida, Abdur argued that the modernization of the Islamic world could not occur until judicial efficiency was realized. Id. To that end, Abdur sought to collapse the major boundaries of the four schools of Sunni jurisprudence, Hanafi, Maliki, Shafi’I and Hanbali. Abdur argued that the principle of juridical pluralism (*ikhtilaf*) was unsustainable for the modern state. Id. Instead, the “ulama ought to convene and put in a book . . . the assured principles of the Law (*shar*), which would be in conformity with the times, accessible to the understanding, and allowing no differences of opinion . . . Then the leader of the community . . . is . . . to implement it.” Id. This call, issued in or around 1900, contrasted with the praise of pluralism attributed to the Prophet: “[d]ifference in my community is mercy.” Id. at 23. Abdur responded by questioning the authenticity of the quotation and by offering passages of the Qur’an in support of rational and unified law. “And this is your community, one community, and I am your Lord: So take heed. But they split the command amongst themselves into factions, each party content with what it had.” Id.

Abdur thus used “Quranic text in support of a unified judicial system [with] a specific political purpose.” Id. Instead, Abdur pushed for the adoption of a version of *ijtihad* (creative legal interpretation) with affinities to a modernist notion of
nonliteral interpretation of those parts of the revelation . . . that seemed least rational.”

Using these precepts, Afghani argued that Islamic traditions allowed for modern science, parliaments, and national armies. While Afghani would later recast himself as an orthodox defender of Islam in the *Refutation of the Materialists*, Afghani never abandoned his modernizing mission. His continued appeals for pan-Islamic cooperation and rational modernization bespeak his continued awareness of Western imperialism.

In 1871, Afghani went to Cairo, where he stayed for seven years. There, Afghani taught Muhammad ‘Abduh and Sa’d Zaghlul, “his most effective legacy to the Muslim world.” He also began associating with freemasons. Afghani’s Masonic connections,


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70 *Id.* at 18 – 19.


73 It is possible that Afghani’s free masonry helps explain his openness to other cultures and peoples. *Algar, Religion and State, supra* note 45, at 195

74 *Algar, Religion and State, supra* note 45, at 195
as well as his continued campaigns against British expansion, prompted his stay in India for four years after leaving Egypt.\textsuperscript{75}

In 1883, he moved to Paris and began writing articles in which he criticized Islam for stifling science, free thought and progress.\textsuperscript{76} His favorite disciple, Muhammad \texttextsuperscript{77}A\texttextsuperscript{b}d\texttextsuperscript{76} joined him later that year, and the two began publishing \textit{al’Urwa al-Wuthqa} – an anti-imperialist, reformist newspaper aimed at ameliorating the condition of the Islamic world through unity, solidarity, and cooperation.\textsuperscript{77} It was during this time that Afghani engaged Renan, who had pronounced in his lecture, “Islam and Science,” that Islam retarded cultural advancement.\textsuperscript{78} Afghani replied\textsuperscript{79}:

“Muslim society has still not freed itself from the tutelage of religion. Considering however that the Christian religion has preceded the Muslim religion by several centuries, I cannot prevent myself from hoping that Mohammedan society will one day succeed in breaking its bonds, and march resolutely in the path of civilization, following the example of western society. . . .”

Afghani’s returned to Iran in 1886, only to leave for Russia, and then return to Iran in 1890.\textsuperscript{80} Afghani’s quest for reforms earned him the Shah’s ire. He was exiled after writing to the ulama criticizing the grant of economic concessions.\textsuperscript{81} Consequently,

\begin{footnotesize}
\begin{enumerate}
\item Keddie, Sayyid Jamal, \textit{supra} note 53, at 117-19.
\item Keddie, Imperialism, \textit{supra} note 559, at 24.
\item Algar, Religion and State, \textit{supra} note 45, at 196; Keddie, Sayyid Jamal, supra note 8, at 223 - 26.
\item Keddie, Sayyid Jamal, \textit{supra} note 53, at 192-196.
\item Id. at 191.
\item Algar, Religion and State, \textit{supra} note 45, at 199.
\item Keddie, Sayyid Jamal, \textit{supra} note 53, at 322-25 (Describing two incidents, one a leaflet campaign and an anonymous placard attributed to Afghani. The placard is discussed at greater length at Part II infra.).
\end{enumerate}
\end{footnotesize}
officials forcibly removed Afghani from his “bast” or sanctuary, a deliberately irreligious act. 82

Embittered, Afghani began a concerted campaign against the Shah from Basra, then part of the Ottoman Empire. 83 There, he wrote a letter to Mirza Hasan Shirazi, 84 further condemning the grant of concessions and asking Shirazi to use his influence to protect the interests of Iran. 85 Afghani then left to London, where he met and collaborated with Malcom. 86

_B. Mirza Malkum Khan Nazem al-Dauleh: Modernizing Jurist_

82 Keddie provides Afghani’s personal correspondence discussing this eviction. **Keddie, Sayyid Jamal, supra** note 53, at 328-29.

83 **Algar, Religion and State, supra** note 45, at 200, 210.

84 _Id._ at 201.

85 **Algar, Religion and State, supra** note 45, at 201. The import of this letter, and indeed of Afghani’s influence on the Tobacco Movement in general, is hotly debated. Browne has argued that Afghani’s intervention was decisive. Keddie takes the more moderate position that Afghani helped encourage Shirazi’s entrance to public affairs, **Keddie, Sayyid Jamal, supra** note 8, at 345 - 47, and Algar argues that Afghani’s impact on the “actual course of events during the agitation against the tobacco monopoly appears to have been nil.” **Algar, Religion and State, supra** note 45, at 201. Contemporary and near contemporary sources are of little help, as disciples such as Rachid Rida and advisors to the Shah self-interestedly exaggerated Afghani’s role in the movement. For what it is worth, the Shah was so bothered by Afghani that the monarch asked the Ottomans to displace Afghani from Iran’s border and “expel him to Yemen, Syria, Jerusalem, or the island of Crete” **Keddie, Sayyid Jamal, supra** note 53, at 348. _See also_, Nikki R. Keddie, The Origins of the Religious-Radical Alliance in Iran, 34 _Past and Present, 70, 70-80_ (1966) (discussing the relative importance of Afghani in crafting eclectic support for a politically motivated ulama).

86 **Keddie, Sayyid Jamal, supra** note 53, at 356.
Mirza Malkum Khan Nazem al-Dauleh (“Malcom”) was another key modernist figure in the Tobacco Movement. Malcom was of Armenian descent. His father, Mirza Yaqub Khan had converted to Islam and authored some of the earliest appeals for a parliamentary government in Iran. Mirza Yaqub became fluent in French and was hired as a translator at the Russian embassy when he returned to Tehran. Mirza’s position allowed him to send Malcom to France at age 10. There, Malcom witnessed the European revolutions of 1848 and subsequent social upheaval.

Malcom was to become one of the main advocates for Western reform in Qajar Iran. He reasoned that purely indigenous discovery would be a waste of time, and that the Islamic world should adopt European advances in law and the sciences. Believing


88 Hamid Algar, Mirza Malkum Khan: A Biographical Study in Iranian Modernism 1 (1973). [hereinafter ALGAR, MIRZA] Interestingly, Malcom supported the earlier Reuter concession as a means to improve internal infrastructure. *Id.* at 114. He also received several large bribes from Reuter in the course of arranging the concession. *Id.* at 123-25.


90 *Id.* at 89-90.


92 *Id.* at 17.


94 *Id.* at 17.
that a rejection of European law and order would result in chaos, Malcom referred to 
European customs as Aieneh Tamaddun – the culture of civilization. 95

Malcom’s favorite theme and cherished principle was the necessity of law. 96
Malcom’s earliest treatise on political, administrative reform was Kitabcha-yi Ghaybi 
(Secret Notebook), also known as the Daftari-Tanzimat. 97 It sets out the need for reform
to protect Iran from foreigners “From Calcutta and St. Petersburg, two awesome tidal 
waves are rolling towards Iran.” 98 Malcom argued that the strength of the Europeans was
due not to their technology but to the “customs of their civilization.” 99 He believed that
Iran must adopt the European governmental system just as it did the telegraph. 100
Malcom uses the word Qanun, rather that Sharia, 101 and advocates a separation of the 
legislative and executive branches. 102

The treatise then lays down 23 laws. 103 The second law states that “All law must
be the expression of the royal will and tend to the welfare of all the people.” 104 The third

95 Bashir, Qanun and Modernization, supra note 42.
96 ALGAR, MIRZA, supra note 43, at 190.
97 ALGAR, MIRZA, supra note 43, at 17 n.61, 190. Tanzimat is clearly a word derived
from Ottoman Turkish.
98 ALGAR, MIRZA, supra note 43, at 28
99 Id.
100 Id. at 17. Here, Malcom is highlighting his own achievement of setting up the first
telegraph in Iran. Id. at 25.
101 ALGAR, MIRZA, supra note 43, at 190; Bashir, Qanun and Modernization, supra note
42.
102 ALGAR, MIRZA, supra note 43, at 33, 108
103 ALGAR, MIRZA, supra note 43, at 30
protects human rights and stresses an equality of all people before the law. He also proposed a tripartite educational system, with a specialized branch for study of “letters, law, medicine, or the arts.” This system envisioned a codification of the law. “The reform council shall collect, within the period of one year, all ‘shar ordinances and those emanating from the state and by subjecting them to the conditions of legality (qanuniyat) incorporate them in the laws of the state.”

Algar notes that this treatise “expounded the primacy of European civilization as the culmination of millennia of human development and the necessity to submit unquestioningly to its norms.” In a separate work, Malcom argues that only by adopting this reform can Iran hope to tear up the treaty of Turkumanchay.

104 Id.
105 Id.
106 Id. at 32.
107 Id. at 31.
109 ALGAR, MIRZA, supra note 43, at 33
110 ALGAR, MIRZA, supra note 43, at 34. The Treaty of Turkumanchay ended the second Perso-Russian war in humiliating fashion. For more information on the Perso-Russian wars, see Part I supra. The two defeats in the Perso-Russian wars are still considered to be the most shameful in Persian history and ushered in an era of intimidation by and capitulation to the West. M. Zirisnky, Reza Shah’s abrogation of capitulation, 1927-1928, in THE MAKING OF MODERN IRAN: STATE AND SOCIETY UNDER RIZA SHAH 1921-1941, 81 (Stephanie Cronin ed., 2003) (“The context of this regime capitulations, of course, is that by the end of the reign of Fath Ali Shah (1798-1834), Iran could no longer defend its independence against the west. ... For Iran this was a time of weakness, humiliation and soul-searching as Iranians sought to assert their dignity against overwhelming pressure from the expansionist west.”). Moaddel has argued that these defeats set the stage for class struggle under the guise of Babism. Mansoor Moaddel, The Shi'i Ulama and the State in Iran, 15 THEORY AND SOC’Y 519, 525 (1986) [hereinafter
In 1883, Malcom set out a new penal code, Daftar-I Qanun (Book of Order). Malcom again called for codification. “[T]he task that now confronts us is to collect and arrange [shar] ordinances . . . and make them the law of the state in the same way that the states of Europe have codified their laws.” The freedom of expression was found in the rule of law and the rights of humans. Malcom famously wrote that he would suffer personal abuse by government, but not abuse of the law: “Based on Islamic principles, enforce in this country the laws that exist in Ottoman cities and Indian villages and the wild American tribes. Imprison us but by virtue of the law. Grab our money but by virtue of law. Confiscate our rights and property but by virtue of the law. Loot and plunder us but by virtue of the law. Banish us from the land but by virtue of the law. Imprison our spouses but by virtue of the law. Cut off our hands, feet and tongues but by virtue of the law. Burn us but by virtue of the law. Cut open our abdomens but by virtue of the law.”

Moaddel, Shi’i Ulama]. While a discussion of Babism is outside of the scope of this paper, it is worth noting that several modern theorists have argued that social reform and class struggle have been misidentified as religious movements in Iran. As further proof of interplay between foreign policy, social movements, and religious developments, these wars also led the ulama to revive the dormant doctrine of jihad. See RUSSIAN IMPERIALISM AND JIHAD: EARLY 19TH-CENTURY PERSIAN TEXTS ON JUST WAR, JOURNAL OF CHURCH AND STATE 263-79 (2004).

111 ALGAR, MIRZA, supra note 43, at 190.

112 ALGAR, MIRZA, supra note 43, at 191 (quoting MAJMU’A-YI ATHAR-I MIRZA MALKUM KHAN, TEHRAN 141 (1327/1948)). Algar notes that this plea calls to mind the failed attempts at codification of Shari’a attempted in 1885 and 1890. Id. at n. 17. For more information on these attempts see Part IV infra.

113 ALGAR, MIRZA, supra note 43, at 246.

114 Bashir, Qanun and Modernization, supra note 42 (quoting Qanun, No. 11, 1).
Malcom was one of many Iranian intellectuals forced into exile during the reign of Naser Shah.\textsuperscript{115} While in England, Malcom published a popular newspaper, entitled \textit{Qanun} ("law/order") calling for reform in Iran.\textsuperscript{116} After Malcom began publishing \textit{Qanun} from England, his fervent supporter, Abdul Hossein Kermani, also known as Mirza Agha Khan, urged him to send copies of the paper to the luminaries of the Tanzimat movement.\textsuperscript{117} Modern scholars consider Malcom to be "the greatest Iranian revolutionary journalist."\textsuperscript{118} Malcom focused on "freedom" and the "power of expression" as the means for "all progress and advancement in the world."\textsuperscript{119}

\section*{III. Previous Interpretations of the Protest}

\textsuperscript{115} \textsc{Algar, Mirza}, \textit{supra} note 43, at 58. Malcom lost favor however when his pseudo-Masonic \textit{faramushkhana} (freemasons), an organization designed to diffuse scientific knowledge, was dissolved by royal decree in October 10, 1861. \textsc{Algar, Mirza}, \textit{supra} note 43, at 39-41.

\textsuperscript{116} Bashir, \textit{Qanun and Modernization, supra} note 42. \textit{See generally \textsc{Algar, Mirza}, supra note 43, at 185-205.}

\textsuperscript{117} Kermani, a Babi, a radical revolutionary, and a reporter for the reformist newspaper Akhtar, epitomized the eclectic membership of the pan-Islamist movement. The pan-Islamist movement included many anti-ulama individuals like Kermani. \textit{See Mehrdad Kia, Pan-Islamism in Late Nineteenth-Century Iran 32 Middle Eastern Stud. 30-52 (1996).} The presence of these individuals in the pan-Islamic movement, as well the movement’s seemingly contradictory appeals to Islamic and Western audiences, has led some scholars to label its leaders, such as Afghani, "secret unbeliever[s]." \textit{See e.g., Elie Kedourie, Afghan and 'Abduh: An Essay on Religious Unbelief and Political Activism in Modern Islam 80 (1992).}

\textsuperscript{118} \textsc{Hamid Mowlana, Journalism in Iran: A History and Interpretation}, 258 (1963).

\textsuperscript{119} I have attributed all writing in the volumes of \textit{Qanun} to Malcom. Although Malcom hinted in press that the \textit{Qanun} was a multi-author collaboration, "it is certain that virtually every word of \textit{Qanun} was the work of Malkum." \textsc{Algar, Mirza, supra} note 43, at 194.
The success of the Tobacco Movement heralded the advent of political Islam in Iran. Due to the importance of this event in the history of Iran, the Islamic resistance to imperialism, and development of Shi’a doctrine, the Tobacco Movement has a rich historiography. Two dominant schools of interpretation view the protest as a natural outgrowth of Shi’a power and an act of resistance by a threatened merchant class. While these interpretations are compelling, they do not fully address the reframing of the movement as one for legal reform.

A. Traditional Interpretation – Independent Role of Shi’ism

The traditional interpretation of the events ascribed the political actions of the ulama to the inherent Shi’a enmity to the polity and to the ulama’s growing power under the Usuli School in the late 1700s. The newly consolidated powers of the ulama and the innate hostility to illegitimate rulers, the traditional interpretation proffers, allowed the ulama to finally exploit the weakness of the Qajar state.

Algar argued that the Shi’a belief in the Imamate practically forces the ulama into the political opposition. Shi’a Muslims believe that following the death of the Prophet, the spiritual guidance of humanity was passed to Muhammad’s cousin and son-in-law Ali, and then to Ali’s direct descendants. The Imamate is thus the succession of

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121 Id.
122 ALGAR, RELIGION AND STATE, supra note 45, at 8.
123 Id. at 2.
infallible Imams, who alone have the right to be Caliphs. With the occultation of the twelfth Imam, no legitimate ruling authority remains on earth. Commentators such as Savory claim that this theological inability to recognize the authority of worldly rulers motivates the ulama’s political behavior in protests against illegitimate usurpers.

The rise of the Usuli School, coupled with the near destruction of the Akhbari, greatly increased the power of the Shi’a ulama. The Akhbari School rejected the use of ijitjad, or creative reasoning, and the Welayat-a-Faqih the guardianship of Islamic jurists. Accordingly, the Akhbari’s believed that the ulama could have no role in politics at all. However, by 1790, the Usuli School completely overwhelmed the Akhbaris. Usulis helped cement the power of the ulama by requiring that all believers choose a living mujtahid to follow and to obey his interpretation (ijtihad).

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124 Id.
125 Id.
126 Roger M. Savory, The Problem of Sovereignty in an Ithna Ashari (‘Twelver’) Shi’i State, MIDDLE EAST REV. 5, 8 (Summer 1979).
129 Rakel, Iranian Foreign Policy, supra note 127, at 162.
130 Id.
131 Id.
argues that this granted “mujtahids a power beyond anything claimed by the Sunni ulama, and gave to their rulings a sanction beyond anything merely decreed by the state”.

B. Marxist Interpretation- Class Consciousness and Bazari Uprising

Moaddel argues that the driving force behind the protest was not the ulama. Instead, he points to the influential merchant class as the most likely mover. Several factors support this interpretation, including the exponential growth in merchant trade from 1796 to 1860, the social standing of merchants, and the pattern of the multi-urban protest movement.

The merchant class grew in power under the rule of the first two Qajar Shahs (1796 – 1834). At this time, Iran was able to achieve greater internal security, thereby encouraging domestic trade and transport of artisan wares to trading ports. Further, the government of India and later Russia established a larger trading presence in Iran. Issawi argues that trade rose threefold between 1800 and 1850. The changes in trade helped develop a robust merchant class.

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133 Moaddel, Class Mobilization, supra note 4.

134 Id. at 452 – 453.

135 Id.

136 Id.

Floor argues that merchants, due to their social, economic, and political resources, essentially controlled the economic life in cities.\textsuperscript{138} In contrast to merchant classes in Confucian states, Iranian merchants “were considered to be more respectable than any other social class.”\textsuperscript{139} Observers have noted the prestige that the Qu’ran affords merchants great respect.\textsuperscript{140} Also, merchants were highly literate, as compared to other segments of the population.\textsuperscript{141}

However, the fortune of the merchant class changed after this boom period, primarily due to tax policies that favored foreign trade, and the sale of concessions to European cartels backed by the implicit threat of imperial might. Moaddel\textsuperscript{142}, and to some degree Keddie\textsuperscript{143} and Abrahamian,\textsuperscript{144} argue that the merchant class mobilized to protect their interests.

\textbf{IV. CLASSICAL LEGAL THOUGHT RECAST AS LOCAL REFORM}

While the traditional and Marxist interpretations of the Tobacco Movement help explain the protest, these interpretations do not account for the effort to frame the revolt

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\textsuperscript{138} Willem M. Floor, \textit{The merchant (tujjar) in Qajar Iran}, 126 Zeitschrifdt er Deutschen Morgenlandischen Gesellschaft 101, 102 (1976).

\textsuperscript{139} \textit{Id}.


\textsuperscript{141} Willem M. Floor, \textit{The merchant (tujjar) in Qajar Iran}, 126 Zeitschrifdt er Deutschen Morgenlandischen Gesellschaft 101, 102 (1976).

\textsuperscript{142} Moaddel, \textit{Class Mobilization}, \textit{supra} note 4.

\textsuperscript{143} KEDDIE, \textit{TOBACCO PROTEST}, \textit{supra} note 3 at 65 (noting that ulama protest actions “reflected their ties to merchant families”).

\textsuperscript{144} ERVAND ABRAHAMIAN, \textit{IRAN: BETWEEN TWO REVOLUTIONS} 60 (1982).
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as a movement for legal reform and codification. These interpretations also do not take
into account a heightened importance of women in reformist rhetoric of the time. Finally
these interpretations do not explain why foreign protests of the concession focused on the
will of international sellers and the importance of free trade. This section defines
Classical Legal Thought, the dominant legal consciousness from 1875 to 1914, and
interprets the events of the Tobacco Movement through the lens of this consciousness.
This section examines the reformists’ focus on the importance of women, the separation
of civil law and family law, the reframing of the movement as a quest for codification,
and foreign rhetoric. This view yields a richer understanding of the revolt and reveals
strong ties between the efforts of the two reformers and later classical reforms.

A. Classical Legal Thought

Classical Legal Thought was a systematic ordering of legal mechanisms to reduce
contradictions in the application of law while focusing on the will of the relevant legal
actors.¹⁴⁵ Legal mechanisms could include the setting of default rules, the adoption of
legal codes, the empowerment of a court to settle jurisdictional questions, methods of
legal reasoning, and conceptions of conflicts between abstractions.¹⁴⁶ Legal actors could
include the legislature, agencies, nation states, or individuals.¹⁴⁷ The guiding principle of

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¹⁴⁷ KENNEDY, RISE AND FALL, supra note 145, at 5-8.
Classical Legal Thought was of powers absolute in their spheres.\textsuperscript{148} That is, in a defined social or legal area, the will of the controlling actor was absolute.\textsuperscript{149} Thus, all legal doctrines and interpretations should be aligned to maximize the autonomy of actors,\textsuperscript{150} with the judicial role of preventing trespass of one party against another.\textsuperscript{151}

This systemization necessitated a hyper classification of all categories of law and social interaction, so that judiciary could identify and respect the relevant legal actors and controlling will.\textsuperscript{152} For example, the will of the private individual is absolute in the sphere of private contracts (the market), while the will of the sovereign state is absolute in the sphere of constitutional law (public agency). Each interaction occupied a space in a continuum of private/public distinction: purely private (contracts), private-public, purely public.\textsuperscript{153} This dichotomy of private/public was repeated for each subcategory of interaction, until the specific matter was correctly classified.

Within this taxonomy was a further segregation of the rational, mutable, and purely legal laws of property (market) and the moral, fixed, and natural norms of family

\begin{itemize}
\item \textsuperscript{149} \textit{Id.} at 638-39.
\item \textsuperscript{150} Kennedy, \textit{Three Globalizations, supra} note 146 at 26 (2006) (describing will theory as “the notion that government should protect the rights of legal persons, which meant helping them realize their wills, restrained only as necessary to permit others to do the same”); \textit{see also} Duncan Kennedy, \textit{From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration of Form”} 100 COLUM. L. REV. 94, 106-08 (2000) [hereinafter Kennedy, \textit{From the Will Theory}].
\item \textsuperscript{151} Kennedy, \textit{RISE AND FALL, supra} note 145, at 6-7.
\item \textsuperscript{152} \textit{Id.} at 250.
\item \textsuperscript{153} An example of this indefinite dichotomy is provided at Kennedy, \textit{From the Will Theory, supra} note 150, at 108.
\end{itemize}
While all law is the product of a people, the laws of the market may
approach the universal, whereas the laws of the family will remain local and
idiosyncratic.  

The preferred method of legal reasoning within Classical Legal Thought was
deduction. Deriving the legal standard for a specific interaction from a hierarchical
deduction based on established first principles, jurists sought to increase coherence and
predictability of legal outcomes. The judiciary could apply settled abstractions to novel
interactions and thereby avoid (or at least appear to avoid) judge-created law. Instead,
the judge was simply deducing the correct application of the abstract law as set down by
the appropriate legal actor; then applying the law to carry out the will of others. When
the abstraction was not immediately apparent, the judge could first induce the correct
abstraction from the surrounding body of law and then deduce the correct application
from that implied legal standard. This maneuver was especially important when laws
appeared to have contradictory outcomes. The judge could induce a unifying implied

154 Kennedy, Three Globalizations, supra note 146, at 32-33.
155 Id. at 34-35.
156 Id. at 21.
157 See Kennedy, RISE AND FALL, supra note 145, at 256.
158 Later jurists’ claims that a false or motivated derivation of a rule merely provided
camouflage for judicially crafted law. See Rudolph von Jhering, Law as a Means to
An End (1877, trans. 1913).
159 Kennedy, RISE AND FALL, supra note 145, at 259 (“The casting of all legal rules in
terms of the wills of legal actors meant that the judge could always claim that he was
acting in subordination to an external compulsion. The parties to the contract, or the
sovereign, decided everything; he decided nothing.”).
160 Duncan Kennedy, The Role of Law in Economic Thought: Essays on the Fetishism of
Commodities, 34 Amer. L. Rev. 939, 955 (1985).
legal standard, rendering seemingly irrational contradictions rational.\textsuperscript{161} This also allowed for the preservation of pre-Classical case law, now reinterpreted in light of induced abstraction.

The goal of this nested taxonomy and hierarchical derivation of interaction-specific rules from abstract principles was to “approach gaplessness” in the law.\textsuperscript{162} Though this could be achieved without a codification of law,\textsuperscript{163} several European nations adopted Classical Legal Thought by drafting systematized, internally coherent, principle-derived legal codes. The German Civil Code of 1900\textsuperscript{164} and later the Swiss Civil Code\textsuperscript{165} embodied the central principles of Classical Legal Thought, with a focus on the preeminence of individual will. A useful indicator of the reception of Classical Legal Thought in other countries is the adoption of these codes, or the drafting of derivative law codes.\textsuperscript{166}

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\textsuperscript{161} See id.; see, e.g., the case method.
\textsuperscript{162} Kennedy, Three Globalizations, supra note 146, at, 26.
\textsuperscript{163} Indeed, Carl Von Savigny, the luminary behind CLT was against codification with its attendant ossification. See Friedrich Carl Von Savigny, System of the Modern Roman Law (1839, Holloway trans. 1867).
\textsuperscript{164} Duncan Kennedy, The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought, 55 Hastings L.J. 1031, 1033 (2004).
\textsuperscript{165} For a useful historical introduction to this influential code, see Ivy Williams, The Sources of Law in the Swiss Civil Code (1925).
\textsuperscript{166} For example, in 1911 the Qing dynasty drafted the first three books of the Draft Civil Code of the Great Qing - General principle, Obligation, and Rights Over Things based on the German Civil Code of 1900. Yin-Ching Chen, Civil Law Development: China and Taiwan, 2 Stanford Journal of East Asian Affairs 8, 9 (Spring 2002). However, the dynasty fell before the code was promulgated. Id. After first following the French tradition, Japanese jurists modeled their Civil Code on the first draft of the German Civil
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B. International Law and the Spread of Classical Legal Thought

Classical Legal Thought sought to move “law” from the customary to the scientific. This mirrored the intense focus on technological advances of the day.\textsuperscript{167} It also provided imperial powers with a means to denigrate or deny “natural” international law as well as the laws of uncivilized nations.\textsuperscript{168}

The Core spread Classical Legal Thought to the periphery largely through force. While adventurous trading companies initially established colonies, the French, British, and Dutch governments stepped in to administrative roles following mutinies and misrule.\textsuperscript{169} These new administrations adhered to Classical Legal Thought, using the conception of powers absolute in their spheres' to delegate authority within conquered territories.\textsuperscript{170} Even countries in the semi-periphery that were never colonized adopted Classical Legal Thought.\textsuperscript{171} They did so in order to join the community of nations.

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\item \textsuperscript{167} Kennedy, \textit{Three Globalizations}, supra note 146, at 26; see also, Antony Anghie, \textit{Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law}, 40 HARV. INT’L L.J. 1, 22-23 (1999).
\item \textsuperscript{168} Kennedy, \textit{Three Globalizations}, supra note 146, at 30.
\item \textsuperscript{169} ERIC HOBSBAWM, \textsc{The Age of Empire: 1875 – 1914, 64 – 99} (1987).
\item \textsuperscript{170} Kennedy, \textit{Three Globalizations}, supra note 146, at 28 - 29; A. V. DICEY, \textsc{Introduction to the Study of the Law of the Constitution} 95 – 98 (1885, 8\textsuperscript{th} ed. 1915).
\item \textsuperscript{171} Kennedy, \textit{Three Globalizations}, supra note 146, at 28.
\end{itemize}
\end{footnotesize}
thereby staving off colonization, enhancing their own prestige, and creating a more favorable economic environment.\textsuperscript{172} The elite of these countries had attended European universities, worked with the founders of Classical Legal Thought, and brought the consciousness home.\textsuperscript{173}

The Classical approach to International law preserved the focus on the private/public split and the preeminence of the will. The law of the market consisted of free trade, the gold standard, and private international law.\textsuperscript{174} Each of these moves was thought to facilitate private dealing and the exercise of the will. Focusing on the will of buyer and seller, these doctrines shielded the private contract from undue interference. Free trade prevented the creation of monopolistic trading blocks.\textsuperscript{175} The gold standard prevented the politicization of financial exchange.\textsuperscript{176} Social relationships were recast in contractual terms, as guilds were converted to voluntary trade associates and familial servants to paid domestics.\textsuperscript{177}

While the large influx of capital and foreign products destroyed traditional economic norms and destabilized status-based social/financial interactions, Classical Legal Thought’s private/public distinction spared some social institutions. Classical


\textsuperscript{173} Kennedy, \textit{Three Globalizations}, supra note 146, at 30-31.

\textsuperscript{174} \textit{Id.} at 29.

\textsuperscript{175} This is of course a pipe dream, as the rush for colonies was inspired in part by the desire for the creation of wider, intra-Empire exclusionary trading blocks.

\textsuperscript{176} Kennedy, \textit{Three Globalizations}, supra note 146, at 29.

\textsuperscript{177} \textsc{Frierich Meinecke, The Age of German Liberation} (Peter Paret ed., 1906) (1976).
Legal Thought conceived of domestic public law as more norm based and traditional than contract law, but family law was even more so.\textsuperscript{178} This conception of the domestic sphere, as well as the desire to avoid strong backlash from the local populace, colonizers and evangelists for CLT would frequently refrain from interfering with foreign family law.\textsuperscript{179} Only in extreme cases, such as sati (widow burning), would imperialists directly impose Western cultural norms.\textsuperscript{180}

\textit{C. Family Law as Mechanism for Indigenous Framing of Classical Legal Thought}

The private/public distinction at the heart of Classical Legal Thought allowed the nations that adopted Classical Legal Thought to make the consciousness local. Family law is the province of the moral, the religious, and the \textit{volk}.\textsuperscript{181} Thus, while the law of the market was imposed by or directly borrowed from foreign powers, the law of the family was the sanctuary for the national character.\textsuperscript{182} Periphery nations used this mechanism to elevate and contrast the feminine character of their chaste women with the masculine

\textsuperscript{178} \textit{Kennedy, Three Globalizations, supra} note 146, at 32-33; \textit{SAVIGNY, supra} note 163, at 278 - 286. For an example of this reluctance to interfere with familial matters, see Reva Seigel, \textit{The Rule of Love, Wife Beating as Prerogative and Privacy}, \textsc{Yale L.J.} 2117 (1996).

\textsuperscript{179} \textit{Kennedy, Three Globalizations, supra} note 146, at 34.

\textsuperscript{180} \textit{Id.; Janik Nair, Women and Law in Colonial India: A Social History,} 55 - 56 (describing the “unprecedented effort” by the British to abolish the practice of widow immolation).

\textsuperscript{181} \textit{SAVIGNY, supra} note 163, at 279.

\textsuperscript{182} \textit{See Partha Chatterjee, The Nation and Its Fragments: Colonial and Postcolonial Histories} (4th ed. 1993); \textit{see also} Margot Badran, \textit{Dual Liberation: Feminism and Nationalism in Egypt from the 1870s to 1925}, Feminist Issues 15-24 (Spring 1988).
promiscuity of Core whores.\textsuperscript{183} The entire enterprise allowed local elites to emphasize their independence and criticize the dominant world powers while simultaneously adopting the rules of the world market.\textsuperscript{184}

This connection of the Woman to national pride could result in spirited calls for Women’s Rights. Qasim Amin, a Egyptian jurist, nationalist and disciple of Abdul, published two books on the subject of the plight of women in Egypt, \textit{Tahrir al Mara’a} (“The Liberation of Women”) and \textit{al Mara’a al Jadida} (“The New Woman”).\textsuperscript{185} In these works, Amin argued that the weakness of Egypt, and indeed the Arab world, sprang from a mistreatment of its women. “The work of women is society is to form the morals of the nation.”\textsuperscript{186} However, Amin argued that modern despots have created a cult of strength, so that “the strong learned to despise the weak, and men to despise women.\textsuperscript{187} The solution to the social weakness, reflected in the weakness of the Islamic world vis-à-vis the Europeans and in the weakness of Islamic peoples vis-à-vis their despotic rulers, was to improve the position of women and to limit the practice of polygamy.\textsuperscript{188} Amin used

\begin{footnotesize}
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\item \textsuperscript{183} \textit{See}, e.g., Malcom, \textit{Persian Civilisation}, 59 Contemp. Rev. 238, 243 (1891) (“[I]t is difficult for [Muslims] to understand why [polygamy, a] legalized system of restricted intercourse between sexes is so abhorrent in the eyes of Christian people who openly tolerate the absolutely unrestricted, though frequently protected, system of promiscuous intercourse now current in every civilised capital of Europe.”).
\item \textsuperscript{184} Kennedy, \textit{Three Globalizations}, supra note 146, at 34.
\item \textsuperscript{185} \textit{Albert Habib Hourani, Arabic Thought in the Liberal Age}, 1798-1939, 64 (1962).
\item \textsuperscript{186} \textit{Id.} at 64 (quoting \textit{Tahrir al Mara’a}, 116).
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Id.} at 164, 166.
\end{enumerate}
\end{footnotesize}
Islamic scholarship to argue for the education of women, whose competence would inform the next generation of children. 189

Amin relies on the Quranic Sura iv.2 “Marry such women as seem good to you, two, three, four; but if you fear you will not be equitable, then only one” to argue that polygamy should be exceedingly rare, because of the difficulties of treating all wives justly. 190 In Amin’s second book, The New Woman, he argues that for a civilization to advance, it must have laws that take everyone equally into account. 191 This separate law would divide the spheres of influence between the laws of civilization and those of religion. 192

Amin’s attack on polygamy bears a striking resemblance to Malcom’s earlier attack on plural marriage. Each claims that internal reform will eliminate the loathsome institution. Further, the removal of the practice will stimulate the adoption of European advancements in both culture and science. 193 Each appeal has the same themes: the desire

189 Id. at 165. Compare this view to Malcom’s praise of women in Qanun: “Women make up half of any nation. No plan of national significance will move forward unless women are consulted. The potential of a woman aware of her human essence, to serve in the progress of her country is equivalent to that of 100 men.”

190 Id. at 166.

191 Id. at 169.

192 Id. (“While treating Islam with all respect, he claims the right for civilization to develop its own norms and act in light of them. This means also that civilizations can be judged by those norms; and while Islam is the true religion, that does not necessarily mean that Islamic civilization is the highest civilization.”) Id. at 169-70.

193 Id. at 169 (“The freedom of women in Europe . . . is not based on custom and feeling but on rational and scientific principles. It is useless to hope to adopt the sciences of Europe without coming within the radius of its moral principles; the two things are indissolubly connected, and we must there be prepared for change in every aspect. . . .”).
to adopt European technology and customs, the need to internally reform the treatment of women, the reconciliation of Islam with a more liberal conception of women, and the fact that this transformation will require laws and secular norms.\textsuperscript{194} Both men temper their appeals by arguing that aspects of femininity are found wanting in the West.\textsuperscript{195}

One of the hallmarks of Classical Legal Thought is the distinction made between the scientific laws governing society and the traditions shaping the interactions within the family.\textsuperscript{196} Malcom, in an appeal to the West, stresses that the legal and scientific principles found in the West are analogous to those in the Islamic tradition,\textsuperscript{197} excepting the practice of polygamy.\textsuperscript{198} Malcom details how the practice of polygamy is one of the most ancient and constant laws in Asia.\textsuperscript{199} Furthermore, the practice may be slowly reformed, as Islamic law has been doing for the last centuries, but any reform must be purely local.\textsuperscript{200} Any foreign attempt to influence the direction of family law will instead retard organic, local reform.\textsuperscript{201} The advancement of women was a common topic in

\textsuperscript{194} For Oasim Amin, see id. at 169 - 170. For Malcom, see Bashir, Qanun and Modernization, supra note 42.

\textsuperscript{195} Amin argued that while the European middle class are morally sound, the poor and rich “are rather lacking in sexual virtue.” Id. at 169.

\textsuperscript{196} Id. at 164-165.

\textsuperscript{197} Malcom, Persian Civilisation, 59 CONTEMP. REV. 238, 240-42 (1891);

\textsuperscript{198} Id. at 242-43.

\textsuperscript{199} Id. at 242.

\textsuperscript{200} Id. at 242 - 43.

\textsuperscript{201} Id. at 243.
Malcom’s *Qanun*. Interestingly, Malcom contrasts Western disgust with polygamy with Islamic disgust of promiscuity. Such an argument would later be taken up as an important counter attack on supposed Western cultural superiority.

In contrast to the gradual local reform of family law, Malcom argued that a national parliament should create civil laws in a grand meeting. “What is the remedy for Iran’s misery? The remedy lies in the hands of the Mujtahids and depends on the efficiency of the Persian scholars. The Mujtahids and the great ones of the tribes should gather round the king and eradicate these floods of misery in the Great National Parliament by polity and legal codes in Iran.”

202 “The rush of women to participate in the movement of humanity is surprising [but welcome]. . . . Women have understood the meaning and advantages of humanity much better than men or, rather non-men.” *Qanun*, 2, p.2.

“The defeat of the agora of unmanliness and dishonour depends on [women]. . . . Now that we have set ourselves on this path, you will witness how women will set alight a flaming fire in this country with the torch of humanity.” *Qanun*, 3, p.4


205 Bashir, *Qanun and Modernization*, supra note 42, (quoting *Qanun*, No. 18, 2).

Malcom repeatedly stresses the need for justice and a code of laws. “We want to organise a Great National Parliament in which the great Ulama and the notable scholars may independently fix and constantly protect the rights of the state and the nation according to the Shari’ah of God.” *Id.*, (quoting *Qanun*, No. 22, 1).

“At least 100 Mujtahid and notable scholars and outstanding sages of Iran should be gathered in the capital in a National Parliament and given authority to fix and formally announce the laws necessary for the organisation of Iran, and protect themselves and the law according to a general agreement. Without the last condition, namely without the existence of a national parliament constantly protecting the enforcement of the law, the best laws of the world will be invalid and meaningless.” *Id.* (quoting *Qanun*, No. 6, 2).

“We are greatly thankful to the ambassadors of the countries for advancing the advantages of laws in our country.” *Id.* (quoting *Qanun*, No. 1, 4).
D. Classical Legal Thought in European Reactions to the Concession

Classical Legal Thought provided a common language of legal protest for Europeans. While the arguments of Iranian reformers appear to have some characteristics of classical framing, European opponents to the concession clearly used classical argument to attack the proposed monopoly. The tobacco concession, which granted so many privileges to the British, naturally aroused jealousy on the part of the other foreign power in Iran, Russia. Though Russian support was not the main factor in the success of the Tobacco Movement, Russian opposition to the concession helped frame the argument in terms of Classical Legal Thought. The concession would violate the law of the market since “Russian subjects would be forced to purchase tobacco from Englishmen.” Indeed, the Russians, by arguing that monopoly could not be granted since it would violate the will of the merchant, seem to be cribbing from earlier British protests against a proposed Russian opium monopoly:

“We do not demand new laws. What we want is what God, His messenger and the Muslim authorities have determined for the welfare of the world.” *Id.* (quoting Qanun, No. 12, 3).

“The first law, which is the pillar of the people’s life, must be based on the security of life, property and the family of people. No laws should be able to imprison or torture anyone unless by decree of the laws.” *Id.* (quoting Qanun, No.35, 1).

“The law should be based on the principles of justice.” *Id.* (quoting Qanun, No. 2, 2).

206 For more information on a shared language of abstraction and the langue / parole distinction, see Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1175 (2001).

207 KEEDIE, TOBACCO PROTEST, supra note 3, at 41 (noting that the British tended “to see the Russian hand everywhere”).

208 *Id.* at 41 (quoting Butzov, the Russian Minister in Tehran).

209 However, it should be noted that this same argument is made in religious terms in an anti-concession petition from the four principle mujtahids, who noted that “all
“The grant of the opium monopoly appears to be contrary to [various treaties]... we cannot allow our merchants to be prevented from dealing wheresoever they choose.”  

Russian protests and French assessments of the tobacco concession noted that the agreement would certainly violate previous free trade agreements between the European powers and the Qajars. The rise of Classical Legal Thought added weight to these arguments, while constraining Britain’s ability to defend its actions. The fact that this agreement impinged on an individual’s ability to contract, the most private and thus most rational section of the law, made the agreement intolerable. Further, Butzov, the Russian Minister in Tehran, formally protested against the concession as “against the Treaties and adverse to the Commerce of the country.” Thus, the concession would be doubly offensive, in that it would prevent free trade and would breach an existing transactions under [the concession] will be illegal according to the Koran, since the consent of the seller will not exist.” KEDDIE, TOBACCO PROTEST, supra note 3, at 77.  

KEDDIE, TOBACCO PROTEST, supra note 3, at 43.

211 A dispatch from September 17, 1890, shows that the French Minister at Tehran agreed with the Russian position, that the concession was against Persian treaties granting free trade. KEDDIE, TOBACCO PROTEST, supra note 3, at 44. The same dispatch noted that the Russians had secured an exception to the concession for their subjects. Interestingly, no power seems to have argued that these treaties, growing out of large military defeats, were obviously coerced. Anghie anticipates this omission, noting that unequal treaties are interpreted as willful contracts. See Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, 40 HARV. INT’L L.J. 1, 60 - 61(1999).

212 Britain’s earlier arguments for free trade would be logically inconsistent with support for a monopoly in Iran. A member of the British Foreign Office, T. H. Sanderson wrote “[t]he concession is clearly a monopoly . . . We have object to an opium monopoly and I do not see how we can logically defend a tobacco monopoly.” KEDDIE, TOBACCO PROTEST, supra note 3, at 42.

213 KEDDIE, TOBACCO PROTEST, supra note 3, at 42.
contract. As reported in the Financial Standard, March 7, 1891: “[t]he Russians deny that Persia has the right to grant monopolies; that is to say, especial privileges to one Power or one individual to the exclusion of others. . . . It appears that Persian statesmen [have promised] . . . beyond the limits of what they could.”

E. Reframing the Revolt as Legal Reform

Western newspapers largely presented the events of 1891 as Islamic fervor or as a minor event. Several British diplomats record similar observations in their diaries. This narrative fit the larger Orientalist conception of Persia, as a backward land beholden to religion, chained to despotism, and hostile to science.

Afghani and Malcom worked tirelessly to frame the West’s understanding of the Tobacco movement’s prime impetus as something other than minor “Mohammedan unrest.” In 1892, Afghani published “The Reign of Terror in Persia” in the Contemporary Review. The work explains the revolt as a demand for the rule of law. While “[a] patriarchal government without a written code is tolerable,” Persians must endure

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215 KEDDIE, TOBACCO PROTEST, supra note 3, at 51.


217 KEDDIE, TOBACCO PROTEST, supra note 3, at 104 – 109.

218 KEDDIE, SAYYID JAMAL, supra note 53, at 192-196.

“sleepless tyranny.” This state of affairs is practically inevitable because “there has never been a single line of written law for the guidance [of the government] – never been any equitable government at all: everything centres in the Shah.” To combat this tyranny, the people cry out for “A code of law!” without which, there will be “no law, no courts of justice, no security of life and property.” Afghani contrasts this picture of a “deep-seated revolt” with Western depictions of the revolt as a “local difficulty with police.” He then proceeds to describe the tobacco monopoly as a crime against the will of the merchants, using an argument familiar to contemporary legal theorists. “The prescriptive and inalienable right of the Persian to sell his tobacco or other wares to whom he will, was grossly violated by the Shah….”

At this time, The Pall Mall Gazette published The Shah and His People: An Inside View, attributed to a member of the Iranian Opposition, which reads similarly to the appeals of Malcom and Afghani. It frames the Tobacco Movement as a revolutionary struggle for legal reform:

Will it be believed that this revolt, now beginning to surge up in Teheran, Schiraz, Khorassan, Tabris, and in every city in Persia, is what is alluded to in one of its wires by the Times of November 4 as a purely religious and local one – as who

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220 Id. at 240.
221 Id. at 242.
222 Id. at 241.
223 Id. at 246.
224 Id.
should pooh pooh the French Revolution as purely secular and Parisian? . . . [The Persian people] cry aloud for the moral and diplomatic support of England to help them to law – to security of life and property. . . . The Shah has seized six men of rank and learning, whose only crime is that, in common with the masses, they begged for some law – any law . . . . For the first time – through the teachings, now amazingly spread abroad, of Prince Malcom – we know how to express our wants – we know what law, justice, government, and protection mean. We are determined to have them.”226

At the National Liberal Club in Dec. 19, 1891, Afghani argued that the revolt was “misrepresented in the British Press as being of a religiously fanatical character, that it actually included demands for reforms and a legal code.”227 The Leeds Mercury described the content of the meeting in political, rather than strictly religious terms.228 Though it noted that Afghani was a direct descendent of a the prophet, it stressed that he was the rare “Oriental liberal.”229 The description focuses on the rule of law and the political goals of the Tobacco Movement: “[Afghani] made a strong attack on the character of the Persian Government, which he declares to be in a complete state of chaos and corruption,

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227 KEDDIE, SAYYID JAMAL, supra note 53, at 362 (citing to an unknown newspaper, which I believe to be the Leeds Mercury, December 19, 1891).

228 Issue 16756 (England: December 19, 1891); See also MANCHESTER GUARDIAN (England: 19 December 1891).

without a written code of law. . . . [Afghani explained his exile due to joining a society.]
All that this society asked for was a written code of laws. . . . In fact, there seems to be a rather formidable political ferment in Persia, with the deposition of the Shah as the extreme aim of the reformers. . . . [Afghani] bespoke the sympathy of the English people for the reform movement.” 230 This speech may have helped spur “severe criticisms of government policy in the tobacco affair made by the Liberal opposition in the spring of 1892” which marked a departure from religious framing alone. 231

While Afghani and Malcom’s reframing of the Tobacco Movement as a demand for legal reform was certainly motivated, it was not necessarily untrue. The legal system of Qajar Iran was notorious for its arbitrariness and corruption, with multiple jurisdictional overlap of unpredictable shār’ and ‘urf courts and cruel sentences in the mazalim process. 232

230 Id. On the same day as Afghani’s talk with the National Liberal Club, The Pall Mall Gazette published an interview of Afghani. Issue 8346 (London: December 19, 1891). He opined that “the Koran is in perfect accordance with modern liberties . . . [and] a learned Mussulman, well acquainted with the liberal principles of Europe, can easily convey them with the authority of the Koran, without the difficulties which surround Luther.” This comment further draws a parallel between past European and present Iranian reform, and may have provided readers with a more sympathetic view of the tobacco revolt.

231 KERDIE, SAYYID JAMAL, supra note 53, at 362. ABERDEEN WEEKLY JOURNAL Issue 11640 (Scotland: May 24, 1892)(“Mr. Labourchere protested against what he called the atrocious swindle contemplated by the Government.”) THE BELFAST NEWS-LETTER Issue 23990 (Ireland: May 24, 1892). (“Mr. Cunninghame-Graham asked had the Corporation expended any money usefully in Persia, or whether the expenditure had simply gone to squaring officials there.”) DAILY NEWS Issue 14399 (London: May 27, 1892) (noting a long discussion of how the British Government could not aid the concessionaires without providing “explanations satisfactory to the national conscience.”).

Two court systems, shar’ and ‘urf shared overlapping and uncertain jurisdiction in Qajar Iran. The ulama presided over religious or shar’ courts, which adjudicated most civil matters, including contracts and matters of personal status.\textsuperscript{233} Urf courts, with government officials as judges, oversaw criminal law.\textsuperscript{234} The barrier between these courts was porous\textsuperscript{235} and there seems to have been no clear policy with regards to conflicting judgments.\textsuperscript{236} A shar ruling could only be overturned by a mutjahid with greater social standing and knowledge.\textsuperscript{237} However, shar’ courts had no independent mechanism for enforcement.\textsuperscript{238} State officials could carry out verdicts, provided that the victim paid the “enforcement fee” in the form of a bribe.\textsuperscript{239}

The obvious defects of the shar and ‘urf systems led to the calls for justice and piecemeal reforms. One of the ad hoc legal reforms was the reinstatement of mazalim, a system that often yielded brutal punishments. Mazalim courts seem to have functioned sporadically throughout the second half of the nineteenth century.\textsuperscript{240} These involved a direct appeal to the Shah, or perhaps the regional governor.\textsuperscript{241} Like the ‘urf, these rulings

\begin{footnotesize}
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\item[233] \textit{Id.} at 84.
\item[234] \textit{Id.} at 84-85.
\item[235] \textit{Id.} at 85.
\item[236] \textit{Id.}
\item[237] \textit{Id.}
\item[238] \textit{Id.}
\item[239] \textit{Id.}
\item[240] \textit{Id.} at 87.
\item[241] \textit{Id.} at 86 - 87.
\end{itemize}
\end{footnotesize}
were entirely arbitrary, and the draconian punishments meted out because a point of contention for the British and Russian trading missions. 242

By the time of the Tobacco Movement, failed attempts at judicial reform convinced reformers that internal government-led improvement was impossible. In the late 1850’s, two important legal reforms failed to take hold. In 1855, there was an attempt to “abolish the legal force of contradictory juridical opinions,” but this effort appears to have failed. 243 In 1858, the recently created department of justice was to establish regional offices in each province and to issue decrees to either court system. 244 However, this reform also seems to have been abandoned. 245 These abortive attempts at internal top-down reform caused later reformers to question the ability of the Shah to correct the flawed legal system. “After fifty years of reign, and after turning Iran into a cemetery, they now want to fix laws in Tehran. The intention is quite clear. The same deception of people and the same victory of the tyrant that has become the habit of the authorities of this reign during this long period. From a system whose foundation is laid on tyranny and usurpation, what can we expect from the law?” 246

Reframing the revolt as an internal movement for legal reform also served Iran’s foreign interests by highlighting the civilized sovereignty of the Iranian people. In light of developments in positivism and the conception of international law, non-European

242 Id. at 86.

243 Id. at 85.

244 Id.

245 Id.

246 Bashir, Qanun and Modernization, supra note 42 (quoting Qanun No. 24, 1).
powers had to emphasize their civilized nature in order to join the “Family of Nations” and enjoy any meager legal protection from European predation.\footnote{There is an argument to be made that entry into the Family of Nations did little to improve the conditions of non-European members. For a theory of semi-peripheral advancement through oppression of the periphery, see THOMAS SHANNON, AN INTRODUCTION TO THE WORLD SYSTEM PERSPECTIVE 29 - 31(1989).} At best, non-European powers could adopt European systems. Failing that, non-Europeans could attempt to show that they were at least capable of adopting European systems in the future.

Anghie correctly points out that as Western jurists conceived law as the creation of sovereign will in the domestic sphere,\footnote{Antony Anghie, Imperialism, Sovereignty, and the Making of International Law 41 (2005) [hereinafter Anghie, Imperialism].} the notion of internal law as natural law weakened.\footnote{Anghie, Imperialism, supra note 248, at 54 (noting that while naturalists concluded “that all societies were bound by a universal natural law,” positivists “asserted that only the practice of European states was decisive and could create international law”).} Positivists like Wheaton applied this law in the context of the sovereign will paradigm to the international sphere, wherein rules of conduct could only be agreed upon by sovereign states.\footnote{Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, 40 HARV. INT’L L.J. 1, 22-23 (1999). [hereinafter Anghie, Sovereignty and Colonialism].} However, non-Europeans were seen as lacking sovereignty if they did not exercise permanent control over territory.\footnote{Anghie, Sovereignty and Colonialism, supra note 251, at 26 - 27; Lawrence, 190 (“Modern International Law, being permeated throughout the by the doctrine of territorial sovereignty, has adopted the latter principle as fundamental.”). See also Lawrence 84-85 (“[T]he possession of a fixed territory and a certain size and importance are essential to membership in the family of nations.”)} Thus, “international law” could not bind the conduct of a European sovereign when dealing with an “uncivilized” or
“unsettled” non-European people.\textsuperscript{252} Wheaton argued that International Law was reserved for Europeans and their descendants:

“Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or those of European origin.”\textsuperscript{253}

While positivists claimed that territorial control was vital to sovereignty, some non-European powers controlled significant tracts of land. Positivists distinguished between civilized and land-holding, “uncivilized” peoples based on societal characteristics.\textsuperscript{254} Uncivilized nations are not “subject to International Law, because they [lack] various characteristics, which, though not essential to sovereignty, are essential to the membership of the family of nations.”\textsuperscript{255} This examination of society allowed Europeans to deny legal protection to much of the non-European world.

A vital characteristic of civilized nations was the presence of ordered law.\textsuperscript{256} Barbaric regions, devoid of law, obviously did not deserve legal protection. Lawrence noted that “[i]t would, for instance, be absurd to expect the king of Dahomey to establish a Prize Court, or to require the dwarfs of central African forest to receive a permanent

\textsuperscript{252} Anghie, \textit{Sovereignty and Colonialism, supra} note 250, at 26-27.

\textsuperscript{253} \textsc{Henry Wheaton, Elements of International Law} 15 (1904).

\textsuperscript{254} Anghie, \textit{Sovereignty and Colonialism, supra} note 251, at 28-29. Lawrence, 85 (“A further requisite [beyond territorial control] is that the state to be admitted [to the family of nations] shall to some extent be civilized after the European model . . . .”).

\textsuperscript{255} \textsc{Thomas J. Lawrence, The Principles of International Law} 58 (1910).

\textsuperscript{256} Anghie, \textit{Sovereignty and Colonialism, supra} note 251, at 29, 30.
diplomatic mission.” 257 If a non-European nation had a system of laws, Europeans could still deny membership by claiming that these systems “were of such an alien character that no proper legal relations could develop between European and non-European states.” 258 Westlake used this maneuver to deny the equality of civilized but “different” Asian states such as “Turkey and Persia, China, Japan, Siam and some other countries.” 259 Oppenheim noted the assumption that these different societies could not understand European International Law norms:

> “Before the World War the position of all non-Christian States except Turkey and Japan, [such as] China, Mongolia, Siam, Persia, and further Abyssinia was doubtful . . . . Their civilisation was essentially so different from that of the Christian States that international intercourse with them of the same kind has been hitherto impossible. And neither their Governments nor their populations were yet able fully to understand the Law of Nations and to take up an attitude which is in conformity with all the rules of this law.” 260

In order to belong to the family of nations, a non-European nation must not only be “civilized” but also have sufficiently familiar legal structures. 261 Thus, all non-European powers, if they wished to be able to even converse in the legal world, had to adopt the European social model. There was no agreement among European nations as to

257 LAWRENCE, supra note 255, at 58. Compare to Curzon’s description in PERSIA AND THE PERSIAN QUESTION 391, 401 (1892) (“In a country so backward in constitutional progress, so destitute of forms and statutes and charters, and so firmly stereotyped in the immemorial traditions of the East . . . the government of Persia is less else than the arbitrary exercise of authority. . . .”).

258 ANGHIE, Sovereignty and Colonialism, supra note 250, at 30.

259 JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 102 (1894); see also ANGHIE, Sovereignty and Colonialism, supra note 250, at 30.

260 LASA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 180 (1921).

261 ANGHIE, Sovereignty and Colonialism, supra note 251, at 52-54.
what level of assimilation would trigger admission to the family of nations. Anghie summarizes the approach “the international law of the period can be read, not simply as the confident expansion of intellectual imperialism, but a far more anxiety-driven process of naming the unfamiliar, asserting its alien nature, and attempting to reduce and subordinate it.” If however, a nation succeeded in assimilating through a series of civil and foreign reforms, it could be re-admitted to the family of nations. While this membership did not mean the nations were equal, it did provide some diplomatic options as a means to fend off imperial aggression.

Japan and Turkey both succeeded in attaining recognition as nations with a claim to international law. However, Turkey’s ascendance was the result of European influence displacing Russian influence in the Ottoman Empire following the Russian defeat in the Crimean war. The formal, unanimous invitation for Turkey to join the family of nations, “admitted to participate in the advantages of public law and system of Europe,” represented such a rare occurrence that it did not present a viable model for

262 See LAWRENCE, supra note 236, at 57, 84 (“No attempt has ever been made to define the exact amount of affinity in modes of life and standards of thought which must be regarded as essential. . . . [T]he state to be admitted shall be to some extent civilized after the European model; but the exact amount of civilization required cannot be defined beforehand.”)

263 Anghie, Imperialism, supra note 249, at 63.

264 Anghie, Sovereignty and Colonialism, supra note 251, at 52-54.

265 Anghie, Sovereignty and Colonialism, supra note 251, at 53-54.


other aspiring non-European nations. Furthermore, the power of the Ottoman Empire would erode over the next half century; Westerners “considered [Turkey] so culturally inferior that Europeans in Turkey had to be protected by their national consular jurisdictions.” Instead the rapid Japanese assimilation of European norms would serve as the self-civilizing exemplar.

European jurists, such as Oppenheim, noted that “Japan [after the conclusion of the Sino-Japanese war in 1895] ranks as a Great Power. That she must from this time be considered a full member of the Family of Nations becomes apparent from the treaties

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268 Anghie, Sovereignty and Colonialism, supra note 251, at 46.

269 See Arthur Nussbaum, A Concise History of the Law of Nations 191 (1954) (questioning the significance of Turkey’s admission); Wood, supra note 267, at 264, 270.

270 Alexander Orakhelashvili, The Idea of European International Law, 17 EUR. J. INT’L L. 337. See Oppenheim, supra note 261, at 34 (“[Turkey’s] position as a member of the Family of Nations was anomalous, because her civilization fell short of that of the Western States. It was for that reason that the so-called Capitulations were still in force . . .”).

271 There has been some argument as to whether Japan’s success inspired Islamic countries due to the rapidity of its modernization or due to its ability to retain a national character while modernizing. Huntington analyzed the differing approaches to modernization: Rejectionism, Kemalism, and reformism. See Samuel P. Huntington, Clash of Civilizations and Remaking the World Order, 72-77 (1996). Rejectionism finds both Modernization and Westernization to be objectionable. Kemalism seeks both Modernization and Westernization. Reformism seeks Modernization while limiting Westernization. Japan’s approach of Wakon, Yosei was undoubtably reformist, as were the approaches of Afghani and Abdul. Malcom seems to have occupied a position closer to Kemalism, but it is worth noting that Kemalism as a doctrine did not take shape in the Islamic World until the Second Constitutional Era of the Ottoman Empire. Full assimilation had been discussed in Japan and China earlier and was exemplified by movements to adopt the Latin alphabet. See Nanette Twine, Toward Simplicity: Script Reform Movements in the Meiji Period, 38 MONUMENTA NIPPONICA, 115-32 (1983). Compare this movement to Malcom’s efforts at script reform discussed in Note. It seems clear that Afghani and Mustafa Kamil’s praise of Japan focused on the preservation of national character, while Malcom’s comments on Japan deal more with the ability of the Japanese to adopt European customs due to the weakness of Shinto.
concluded soon afterwards by her with other Powers for the purpose of abolishing their consular jurisdiction within the boundaries of Japan.”

Oppenheim explicitly links consular withdrawal to the advancement of civilization, not only military might. “The case of Japan is an example of the readiness of the Powers to consent to the withdrawal of consular jurisdiction in such States as soon as they have reached a certain level of civilization.”

Japan’s Bunmeikaika movement (civilization and enlightenment) focused a strong domestic push for modernization into a full-fledged transformation of Japanese society. In an effort to resist foreign domination, the Japanese government embarked on a series of reforms initially based on British, French, or American social models. However, in 1881–90 (the so-called “German Decade”) the Japanese moved closer to the Prussian and German constitutional and legal models.

The rapidity of Japanese modernization contrasted with the languid pace of reform in much of the Islamic world. Accordingly, many European Orientalists, with

272 Oppenheim, supra note 261, at 77.
273 Id. at 606.
275 Id.
276 Id. at 197-200.
277 Id.
Renan at the fore, claimed that Islam retarded the growth of civilization and hypothesized that an inferior Semitic stock could not be civilized. 279

Afghani and Malcom were well aware of the strides made by Japan. 280 Malcom accepted that Islam may work to retard adoption of Western Culture, but it may also serve as the vehicle for assimilation through rebranding:

“[W]e do not want to imitate you . . . . It is true that the Japanese have copied Europe. There is no such obstacle there as in our case, for their religion is not so strong. . . . We found that ideas which were [rejected when seen as] coming from your agents in Europe, were accepted at once with the greatest delight when it was proved that they were latent in Islam. . . . [T]he little progress . . . in Persia . . . is due to this fact, that some people have taken your European principles, and instead of saying that they came from Europe . . . have said: ‘We have nothing to do with Europeans; these are the true principles of our own religion . . . which have been taken by Europeans!’”

V. POLITICAL PRECEDENT AND THE IMPORTANCE OF REFRAMING

Afghani and Malcom’s efforts to reframe the Tobacco Movement as a symptom of legal reform provided European commentators with evidence that Persians could

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279 KEDDIE, SAYYID JAMAL, supra note 53, at 192-96.

280 Afghani contrasts the education missions of the Japanese with the useless missions of Persians. He argued that Japan introduced sound civic rules while adopting the empirical sciences. Rashid Rida “We need an independent renewal like that of Japan to promote our economic, military, and political interests . . . . [T]his glorious renewal [will] combine[] the modern and the old.” “al Tajdid wa al-tajaddud wa al-mujaddidum” (Renewal, Renewing, and Renewers), al-Manar, (Translation from Arabic and Introduction by Emade Eldin Shahin), in MODERNIST ISLAM: A SOURCEBOOK 77, 79 (Charles Kurzman ed., 2002). See also Michael Laffan, Mustafa and the Mikado: A Francophile Egyptian’s Turn to Meiji Japan, 19 JAPANESE STUD. 275, 283 (1999) (noting that Egyptian Nationalist Mustafa Kamil credited the constitutional structure of Japan for the nation’s rapid rise). British commentators also recommended that Iran adopt the Japanese model, especially after the Japanese victory in the Russo-Japanese war. See, e.g., Browne in Iran-I naw, 19 January 1911, no. 72,2.
Before the revolt, various commentators had argued that Persians were incapable of reform, either due to apathy or oppressive religiosity. The Times noted that the Persian movement against the tobacco concession was surprising, as the Persians in its estimation were “the most apathetic of the Oriental races.” Orientalists such as Renan had also argued that Islam retarded attempts at local reform. However, the interpretation of the tobacco movement as a political, rather than purely religious, movement served as legitimizing precedent for the Constitutional Movement just a few years later. When Orientalists argued that the Persians did not desire reform and could not understand Western institutions, pro-Persian commentators could use the Tobacco Movement as earlier efforts to reform.

Browne noted the “historical continuity in Iranian attempts to rise above despotism … implying that the demand for the constitutional government was self-induced…”

“Some persons have taken the view that the Constitutional Movement in Persia was fictitious and artificial, and have implied that the late Shah [Muzaffaral-Din] granted his people a brand-new Constitution made in Europe, just as he might have introduced taxi-cabs into Tehran, and that the Persian people neither wanted

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282 THE TIMES (London: 10 November 1893 at 3).

283 KEDDIE, SAYYID JAMAL, supra note 53, at 192-196.


285 Id.

286 Browne became an increasingly important source of information. “Interestingly enough, in spite of his distance but on account of his acknowledged expert authority many Iranians, including some directly involved in the events, later relied on Browne’s accounts in constructing narratives of the Constitutional Revolution.” Id. at 13.

287 Id. at 17.
it or knew how to profit by it. Such a view, in my opinion, can only arise from ignorance of the facts, or malicious misinterpretation of them. The Constitutional idea was vigorously preached and popularized in Persia at least twenty-two years ago by that remarkable man Seyyid Jamalu'd-Dinal-Afghan, and also by the late Prince Malkum Khan....[T]he actual emergence into being and activity of a real popular party, determined to check the extravagance of the Court and resist undue foreign influences, dates from the obnoxious Tobacco Concession granted by Nasiru'd-Din Shah in 1890. Public opinion, which had hitherto been supposed not to exist in Persia, was strongly aroused."288

Browne dated the constitutional movement. "as far back as 1850, when Prince Malkom Khan, the Persian Minister in London, wrote in favor of a Constitution; whilst Sayyid Jamal-ed-din also preached and propagated the movement."289

Ironically, while Europeans could point to the Tobacco Movement as evidence of the Persian desire to modernize or adopt Europeanize civil institutions, this interpretation was also used against Iranian opponents of the constitutional movement. Shaykh Fazlullah Nuri viewed the desire for a constitution as Europeanization and resisted this perceived dilution of the Persian national character. 290 Pro-constitutionalists like Browne could point to the Tobacco Movement as an indigenous demand for political will focused in an Iranian nation.291 This maneuver interpreted the Tobacco Movement with as evidence of an ever present Iranian Nationalism and Nationalism with the Constitutional

288 Id. (quoting Browne, Persian Constitutionalists, 2-3.)
289 Id. at 7, n.29 (quoting THE TIMES, Nov. 30, 1908, at 8, c. e)
290 Moaddel, Shi'i Ulama, supra note 65.
291 Bonakdarian, supra note 281, at 18.
Accordingly, resistance to the Constitutional Movement was unpatriotic and against the true character of Iran.

CONCLUSION

The Tobacco Movement occurred during an era in which many non-European nations adopted Classical Legal Thought, either through direct colonization (e.g., India) or as a means to gain recognition as a member of the Family of Nations (e.g., Japan). While the historical record of the Tobacco Movement remains murky, Iranian reformers used the language of Classical Legal Thought in painting the revolt as a step in legal codification. This maneuver lent credibility to later Constitutional revolts and advanced the notion that Iran belonged to the Family of Nations. Unsurprisingly, rival European powers used classical arguments to oppose a concession that contradicted free trade, a major tenet of classical international law.

A classical interpretation of the Tobacco Movement does not contradict previous interpretations but instead proposes a more coherent explanation of female involvement and the tactics used by exiled reformers. The credibility of the classical thesis is bolstered by the fact that these reformers had strong connections to other devotees of Classical Legal Thought, notably Muhammad Abduh and Oasim Amin. This analysis furthers our understanding of Classical Legal Thought and its possible impact on nineteenth-century political Islam. This novel approach suggests that the origins of political Islam in Iran were more closely linked to Western legal norms than previously believed.

\(^{292}\) Id.

\(^{293}\) Id.