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Contents

Francisco de Vitoria and the Colonial Origins of International Law

Antony Anghie

While Hugo Grotius is generally regarded as the principal forerunner of modern international law, historians of the discipline trace its primitive origins to the works of Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist.[1] Consequently, it is entirely appropriate that the Carnegie Endowment commenced its renowned series Classics of International Law with Vitoria's two famous lectures, *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*.[2] Vitoria's contributions to the discipline are various, and scholars examining the issue have pointed, among other things, to Grotius's indebtedness to him,[3] and to Vitoria's identification of certain fundamental theoretical issues confronting international law. Scholars still refer to the enduring significance of Vitoria's thinking on the law of war and on the rights of dependent peoples.[4]

Vitoria's two lectures, as their titles suggest, concern relations between the Spanish and the Indians. Colonialism is the central theme of these two founding texts of international law. It is hardly possible to ignore the fact that Vitoria is preoccupied with a colonial relationship. While traditional approaches to Vitoria duly acknowledge this fact, they fail to appreciate the extent to which Vitoria's jurisprudence is constructed around his attempts to resolve the unique legal problems arising from the discovery of the Indians. Instead, these traditional

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approaches essentially characterize Vitoria as extending juridical doctrines already developed in Europe to determine the legal status of the Indians.[5]

My argument, in contrast, is that while Vitoria's jurisprudence relies in many respects on existing doctrines, he reconceptualizes these existing doctrines or else invents new ones to deal with a novel problem. The essential point is that international law, such as it existed in Vitoria's time, did not *precede* and thereby effortlessly resolve the problem of Spanish-Indian relations; rather, international law was created out of the unique issues generated by the encounter between cultures. It is in this context that the question arises: what is the relationship between the origins of international law and the colonial encounter in these, the first teachings on international law?

The classical problem confronting the discipline of international law is the problem of how order is created among sovereign states.[6] The identification of this problem as the defining dilemma of the discipline has encouraged scholars to explore Vitoria's work in terms of his understanding and treatment of it.[7] My argument is that Vitoria does not interpret the problem of Spanish-Indian relations as a problem of creating order among sovereign states, of deciding how the competing claims of the sovereign Spanish and the sovereign Indians are to be resolved. Rather, Vitoria's work addresses a prior set of questions. Who is sovereign? What are the powers of a sovereign? Are the Indians sovereign? How are the respective rights and duties of the Indians and the Spaniards to be decided?

In dealing with these issues, Vitoria focuses on the social and cultural practices of the two parties. He assesses and formulates the rights and duties of the Indians, for example, by examining their rituals, customs, and ways of life. Vitoria confronts, then, not the problem of order among sovereign states, but the problem of creating a system of law that could be used to account for relations between societies that he understood to belong to two very different cultural orders, each with its own ideas of propriety and governance. Sovereignty doctrine—by which I broadly refer to the complex of rules deciding what entities are sovereign, and the powers and limits of sovereignty—was not already formulated and then simply applied by Vitoria to resolve the problem of creating order between different societies. Rather, sovereignty doctrine emerges through his attempts to address the problem of cultural difference.[8]

I explore the relationship between colonialism and international law, cultural difference and sovereignty doctrine, by focusing on four broad issues. First, I focus on Vitoria's repudiation of traditional techniques of accounting for relations between the Spanish and the Indians. Having dismissed the old medieval jurisprudence based on the notion that the pope exercised universal authority, Vitoria clears the way for his own version of secular international law. Second, I discuss techniques by which Vitoria creates a universally binding system of law by evoking a system of natural law, which creates a common framework binding Spanish and Indian alike. Third, I consider the rules and norms prescribed by this system, and the effect of their application to Spanish-Indian relations. Finally, I examine the question of enforcement and the sanctions applied once the norms prescribed by natural law have been violated. In each of these areas, I delineate how Vitoria's understanding of cultural difference and the identity of the Indian shapes his jurisprudence, and how in turn this jurisprudence determines the legal status of the Indians.

I conclude by suggesting that this reinterpretation of Vitoria's work is a means of rethinking the relationship between colonialism and international law.

Vitoria and the Problem of Universal Law

Spanish title over the Indies was conventionally accounted for by applying the jurisprudence developed by the Church out of the several centuries of interaction between the Christian and heathen worlds. Within this framework, the Indians could be characterized as Saracens, as heathens, and their rights and duties determined accordingly. The traditional framework relied basically on two premises. First, of the three types of law that the medieval Western world identified—divine, human, and natural[9]—human relations were governed by divine law, which was asserted to be primary by many scholars and theologians of the fifteenth century. Second, the pope exercised universal jurisdiction by virtue of his divine mission to spread Christianity. Consequently, sovereigns, the rulers of Europe, relied upon the pope's authority to legitimize their invasions of heathen territory; in expanding the Christian world by military conquest, these rulers were making real the jurisdiction that the pope possessed in theory.[10] Pope Alexander VI's papal bull dividing the world into Spanish and Portuguese spheres exempli-

fied this set of doctrines: the rule of the sovereign was legitimate only if sanctioned by religious authority.

Vitoria vehemently denies each of these assertions, and in the course of refuting the conventional basis for Spanish title, creates a new system that essentially displaces divine law and its administrator, the pope, with natural law administered by a secular sovereign. Thus, the emergence of a secular natural law—the natural law that was proclaimed to be the basis of the new international law—is coeval with his resolution of the problem of the legal status of the Indian, for it is this problem that initiates Vitoria's inquiry.

Vitoria commences his construction of a new jurisprudence by considering whether "the aborigines in question were true owners in both private and public law before the arrival of the Spaniards" (par. 315, p. 120). Could the Indians, the unbelievers, own property? The traditional answer was no. In the absence of a temporal administration of divine law, the Indians had no property rights. But Vitoria reformulates the relationship between divine, natural, and human law. Having examined numerous theological authorities and incidents in the Bible, he concludes that whatever the punishments awaiting them in their afterlife, unbelievers such as the Indians were not deprived of property in the mundane realm merely by virtue of their status.

> Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural law or human law; therefore they are not destroyed by want of faith. (Par. 322, p. 123)

Crucially, then, Vitoria places questions of ownership and property in the sphere of natural or human law, rather than divine law. Because divine law is inapplicable to questions of ownership, the Indians cannot be deprived of their lands merely by virtue of their status as unbelievers or heretics.[11] Vitoria's argument that vital issues of property and title are decided by secular systems of law—whether natural or human—inevitably diminishes the power of the pope, for these secular systems are administered by the sovereign.

Vitoria further undermines the position of the Church by refuting another justification for Spanish conquest of the Indies: the proposition that "the Emperor is lord of the whole world and therefore of these barbarians also" (par. 340, p. 130). Vitoria denies that the emperor could

have acquired universal temporal authority through the universal spiritual authority of Christ and the pope. He questions whether divine law could provide the basis for temporal authority, methodically denies a number of assertions of papal authority, and concludes, "The Pope is not civil or temporal lord of the whole world in the proper sense of the words 'lordship' and 'civil power'" (par. 351, p. 153). Vitoria goes even further to assert that even in the spiritual realm, the pope lacks jurisdiction over the unbelievers (par. 353, p. 136). The pope's authority is partial, limited to the spiritual dimension of the Christian world.

Vitoria's rejection of the pope's universal authority, which had empowered sovereigns to pursue military action against heathens and infidels, results in a novel problem.

> Now, in point of human law, it is manifest that the Emperor is not lord of the world, because either this would be by the sole authority of some law, and there is none such; or if there were, it would be void of effect, inasmuch as law presupposes jurisdiction. If, then, the Emperor had no jurisdiction over the world before the law, the law could not bind someone who was not previously subject to it. (Par. 348, p. 134)

The Spanish and the Indians are not bound by a universal, overarching system; instead, they belong to two different orders, and Vitoria interprets the gap between them in terms of the juridical problem of jurisdiction. The resolution of this problem is crucial both for Vitoria's new jurisprudence and his construction of a common legal framework that would resolve the status of the Indians. The two techniques by which Vitoria addresses jurisdiction comprise two related parts: first, his complex characterization of the personality of the Indians, and second, his elaboration of a novel system of universal natural law.

Vitoria first focuses on the issue of Indian personality. As his own work suggests, the writers of the period characterized the Indians as being, among other things, slaves, sinners, heathens, barbarians, minors, lunatics, and animals. Vitoria repudiated these claims, humanely asserting that

> the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have poli-

> ties which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion. Further, they make no error in matters which are self-evident to others; this is witness to their use of reason. (Par. 333, p. 127)

For Vitoria, then, the Indians established their own versions of many of the institutions found in Vitoria's world, in Europe itself.[12] They are governed by a political system that has its own coherence and possess the reason necessary, not only to create institutions, but to determine moral questions that are "self-evident" to others.

Vitoria's characterization of the Indians as human and possessing reason is crucial to his resolution of the problem of jurisdiction. He argues, "What natural reason has established among all nations is called *jus gentium*" (par. 386. p. 151). The universal system of divine law administered by the pope is replaced by the universal natural-law system of *jus gentium*, the rules of which may be ascertained by the use of reason. As a result, it is precisely *because* the Indians possess reason that they are bound by *jus gentium*. Vitoria hardly mentions the concept of *jus gentium* in his earlier discussion. Nevertheless, the problem of jurisdiction is resolved by his simple enunciation of this concept, which he elaborates primarily by demonstrating that it creates doctrines that govern Spanish-Indian relations. Natural law administered by sovereigns rather than divine law articulated by the pope becomes the source of international law governing Spanish-Indian relations.

The character of this natural law is illuminated in Vitoria's argument that the Spanish have a right under *jus gentium* to travel and sojourn in the land of the Indians; and that, providing the Spanish do not harm the Indians, "the natives may not prevent them."

> [I]t was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel whereso-ever he would. Now this was not to be taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common user which prevailed among men, and indeed, in the days of Noah, it would have been inhuman to do so. (Par. 386, p. 151)

The natural law that solves the problem of jurisdiction is based on something akin to a secular state of nature existing at "the beginning of the world." As this passage suggests, *jus gentium* naturalizes and legitimates a system of commerce and Spanish penetration. Spanish forms of economic and political life are all-encompassing because supported by doctrines prescribed by Vitoria's system of universal law. The gap between the two cultures now ceases to exist, in that a common framework is established by which both Spanish and Indian behavior may be assessed. Equally important, the particular cultural practices of the Spanish assume the guise of universality because they derive from the sphere of natural law.

The Indians seem to participate in this system as equals. The Spanish trade with the Indians "by importing thither wares which the natives lack and by exporting thence either gold or silver or other wares of which the natives have abundance" (par. 389, p. 152). Each side enters knowingly into these transactions, meeting the other's material lack and possessing, implicitly, the autonomy to decide what is of value to them. The Indian who enters the universal realm of commerce has all the acumen and independence of market man—not the timid, ignorant, childlike creature Vitoria presents earlier. The fairness of the system and the equal status of the parties is further suggested by Vitoria's argument that the Indians are subject to the same limitations imposed on Christian nations: "it is certain that the aborigines can no more keep off the Spaniards from trade than Christians can keep off other Christians" (par. 390, p. 153). Reciprocity, it seems, would permit the Indians to trade freely in Spain.

While appearing to promote notions of equality and reciprocity, Vitoria's scheme finally legitimizes endless Spanish incursions into Indian society. Vitoria's innocuous enunciation of a right to "travel" and "sojourn" extends to the creation of a comprehensive, indeed inescapable, system of norms that are inevitably violated by the Indians. For example, Vitoria asserts that "to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war" (par. 382, p. 151). Thus any Indian attempt to resist penetration amounts to an act of war that justifies retaliation. Each encounter between the Spanish and the Indians therefore entitles the Spanish to "defend" themselves against Indian aggression and, in so doing, expand Spanish territory.

Vitoria endorses the imposition of Spanish rule by another argument that relies explicitly on cultural differences. In establishing his system of *jus gentium,* Vitoria characterizes the Indians as having the same ontological character as the Spanish. This is a crucial prerequisite for his elaboration of a system of norms that he presents as neutral and founded upon qualities possessed by all people. According to Vitoria, Indian personality has two characteristics. First, Indians belong to the universal realm they share with all other human beings because they have the facility of reason and hence a means of ascertaining *jus gentium,* which is universally binding. Second, however, they differ from the Spanish because the Indians' specific social and cultural practices are at variance from those required by the universal norms, which in effect reflect Spanish practices. Thus the Indian is schizophrenic, both alike and unlike the Spaniard. The gap between the Indian and the Spaniard, described primarily in cultural terms by detailed references to their different social practices, is now internalized; the ideal, universal Indian possesses the capacity of reason and therefore the potential to achieve perfection. This potential can only be realized, however, by the adoption or the imposition of the universally applicable practices of the Spanish. The discrepancy between the ontologically "universal" Indian and the socially, historically, "particular" Indian must be remedied by the imposition of sanctions that effect the necessary transformation. Indian will regarding the desirability of such a transformation is irrelevant: the universal norms Vitoria enunciates regulate behavior, not merely between the Spanish and the Indians, but among the Indians themselves; thus the Spanish acquire an extraordinarily powerful right of intervention and may act on behalf of the people seen as victims of Indian rituals: "it is immaterial that all the Indians assent to rules and sacrifices of this kind and do not wish the Spaniards to champion them" (par. 403, p. 159).[13] Thus Spanish identity is projected as universal in two different but connected dimensions; it is externalized, acting as the basis for the norms of *jus gentium,* and internalized, representing the authentic identity of the Indian.

War, Sovereignty, and the Transformation of the Indian

Vitoria's argument that the Indians are human but lacking in proper understanding led him to suggest that they should be treated as children in need of education that could be provided by the Spanish. The relationship between the Indians and the Spanish was that of trusteeship; Spanish governance of the Indians was to be "for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards" (par. 408, p. 161). Within this context, Vitoria's writings were used to defend against Spanish excesses in the New World.[14]

In his second lecture, however, Vitoria presents a very different set of arguments regarding the acquisition of Spanish title over the Indies.

War, the central theme of Vitoria's second lecture, is vitally important to an understanding of his jurisprudence first, because the transformation of the Indian is to be achieved by the waging of war, and second, because Vitoria's concept of sovereignty is developed primarily in terms of the sovereign's right to wage war.

War is the means by which Indians and their territory are converted into Spaniards and Spanish territory, the agency by which the Indians thus achieve their full human potential. Vitoria, I have argued, displaces the realm of divine law and thereby diminishes the power of the pope. Nevertheless, once Vitoria outlines and consolidates the authority of a secular *jus gentium* that is administered by the sovereign, he reintroduces Christian norms within this secular system; proselytizing is authorized now, not by divine law, but the law of nations, and may be likened now to the secular activities of traveling and trading. Vitoria elegantly presents the crucial transition:

> [A]mbassadors are by the law of nations inviolable and the Spaniards are the ambassadors of the Christian peoples. Therefore, the native Indians are bound to give them, at least, a friendly hearing and not to repel them. (Par. 396, p. 156)

Thus all the Christian practices that Vitoria dismissed earlier as being religiously based, as limited in their scope to the Christian world and therefore inapplicable to the Indians, are now reintroduced into his system as universal rules. This astonishing metamorphosis of rules that are condemned by Vitoria himself as particular and relevant only to Christian peoples into universal rules endorsed by *jus gentium* is achieved simply by recharacterizing these rules as originating in the realm of the universal *jus gentium.* Now, Indian resistance to conversion is a cause for war, not because it violates divine law, but the *jus gentium* administered by the sovereign.

Vitoria elaborates on the many situations in which war is now justified.

> If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, they can make war on the Indians, no longer as on innocent folk, but as against forsworn enemies and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones, yet withalwith observance of proportion as regards the nature of the circumstances and of the wrongs done to them. (Par. 395, p. 155)[15]

Given that any Indian resistance to Spanish presence is a violation of the law of nations that would justify sanctions, Spanish war against the Indians is inevitable and endless. The Indian is ascribed with membership within an overarching system of *jus gentium,* with intention and volition; as a consequence of this, violence originates within Vitoria's system through the deviance of the Indian.

Vitoria's exploration of the law of war raises many of the traditional questions that still occupy international lawyers. Who may wage war? When can it be waged? What limits must be observed? What constitutes a just war? War is a special phenomenon, furthermore, because it is the ultimate prerogative of the sovereign.[16] Thus Vitoria's most sustained and explicit exploration of sovereignty doctrine occurs in the context of his examination of the law of war.

Vitoria understands sovereignty, in part, as a relationship—the sovereign has a duty toward his people and the state; and as certain prerogatives—the right to wage war and to acquire title being among the most prominent. The sovereign, the prince, is the instrumentality of the state, posited almost as the metaphysical embodiment of the people.[17] The prince expands the state, as the successful waging of war brings people outside the state within its scope.[18]

While Vitoria thus defined the powers of the sovereign, he had greater difficulty in identifying the sovereign himself. "Now the whole difficulty is in the questions: What is a State and who can properly be called a sovereign prince?" Sovereigns cannot be defined independently of states. The state, claims Vitoria, "is properly called a perfect

community." But then "the essence of the difficulty is in saying what a perfect community is" (par. 425, p. 169). Vitoria's answer is tautologous: "By way of solution be it noted that a thing is called perfect when it is completed whole, for that is imperfect in which there is something wanting, and, on the other hand, that is perfect from which nothing is wanting" (par. 426, p. 169). Neither does it help to define the sovereign as the ultimate authority within the community, for even this proposition is subject to complex qualifications; the complicated hierarchies of the time defy Vitoria, and he acknowledges that a

> doubt may well arise whether, when a number of States of this kind or a number of princes have one common lord or prince they can make war of themselves without the authorization of their superior lord. (Par. 426, p. 169)

Amidst this confusion, Vitoria finally resorts to empiricism, citing as examples of sovereignty the kingdoms of Castile and Aragon, communities that have their own laws and councils.

The foregoing suggests that the power of the state has not been consolidated in any significant way. Authority is too dispersed, and hierarchies, while established theoretically, are too uncertain to convincingly structure sovereignty doctrine. Vitoria's discussion of sovereignty is at its most detailed, however, in his analysis of the laws of war, because it is the sovereign who declares war and exercises all the rights of war.

Just-war doctrine is a crucial aspect of the whole complex of issues relating to the law of war, as the sovereign is entitled to go to war only in certain circumstances. Hence Vitoria poses the question: does the sovereign's subjective belief in the justice of the war ensure that the war is indeed just (par. 434, p. 173)?

Vitoria denies that subjective belief would suffice to render a war truly just, because "were it otherwise, even Turks and Saracens might wage just wars against Christians, for they think they are thus rendering God service" (par. 435, p. 173). Instead of examining the issues of subjective belief and just-war doctrine and then deciding whether or not they applied to the Saracens, Vitoria arrives at his conclusion by first establishing the proposition, the fundamental premise of his argument, that *the Saracens are inherently incapable of waging a just war.* The initial exclusion of the Saracens—and, in this case, by extension, the

Indians—then, is fundamental to Vitoria's argument. In essence, only the Christians may engage in a just war; and, given Vitoria's argument that the power to wage war is the most important prerogative of sovereigns, it follows that the Saracens can never be truly sovereign.

Earlier, in his first lecture, Vitoria had argued that the Indians too possess their own form of rulership, that they "have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops" (par. 333, p. 127). Such a passage may suggest that Indian communities are governed by sovereigns; but Vitoria's insistence, in his analysis on just war, that only Christian subjectivity is recognized by the laws of war, ensures that the Indians are excluded from the realm of sovereignty and exist only as the objects against which Christian sovereignty may exercise its power to wage war.

The task of identifying sovereign authority and defining the powers wielded by such an authority, in the complex political systems of Renaissance Europe, proved extraordinarily difficult, and the techniques and conceptual distinctions used by Vitoria for this purpose were problematic and ambiguous. The distinction between the Indians and the Spanish, however, was emphatic and well developed. Indeed, in the final analysis, the most unequivocal proposition Vitoria advances as to the character of the sovereign is that the sovereign, the entity empowered to wage a just war, cannot, by definition, be an Indian.

Since the Indians are by definition incapable of waging a just war, they exist within the Vitorian framework only as violators of the law. The normal principles of just war, which would prohibit the enslaving of women and children, do not apply in the case of the pagan Indians.

> And so when a war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and women of the Saracens into captivity and slavery. (Par. 453, p. 181)[19]

Once fault is established, as the above passage suggests, the war waged against the Indian is, in Vitoria's phraseology, "perpetual." Similarly, in his discussion of whether it is lawful and expedient to kill all the "guilty" in the course of a war, Vitoria suggests that this may be necessary because of the unique case of the unredeemable Indian.

> [A]nd this is especially the case against the unbeliever, from whom it is useless ever to hope for a just peace on any terms. And as the only remedy is to destroy all of them who can bear arms against us, provided they have already been in fault. (Par. 457, p. 183)

As the previous discussion suggests, it is not difficult in Vitoria's system to establish that the Indians are guilty or "in fault." A certain respect is extended to sovereignty in the case of wars between European powers, as the "overthrow of the enemy's sovereignty and the deposition of lawful and natural princes" are "utterly savage and inhumane measures" (par. 465, p. 186). In the case of the Indians, however, such a deposition is not merely permitted but necessary to save the Indians from themselves. These conclusions stand in curious opposition to other parts of Vitoria's work, where he emphasizes the humanity of the Indians. Simply, war waged against the Indians acquires a metalegal status.[20] Many of the legal doctrines of consent, limits, and proportion that Vitoria outlines earlier cease to apply to the Indian once the all-encompassing and inescapable obligations of *jus gentium* are breached.

In summary, then, there are two essential ways in which sovereignty relates to the Indian: in the first place, the Indian is excluded from the sphere of sovereignty; in the second place, it is the Indian who acts as the object against which the powers of sovereignty may be exercised in the most extreme ways. The most characteristic and unique powers of the sovereign, to wage war and acquire title over territory and over alien peoples, are defined in their fullest form by their application on the nonsovereign Indian.

Conclusion

Vitoria continuously alludes to the theme of the novelty of the discovery of the Indians: thus his work addresses the controversy generated

by "the aborigines of the New World, commonly called the Indians, who came forty years ago into the power of the Spaniards, not having been previously known to our world" (par. 306, p. 116). He argues that "at the time of the Spaniards' first voyages to America they took with them no right to occupy the lands of the indigenous population." In these different ways, Vitoria seizes upon the discovery of the Indians to claim that traditional understandings of law were inadequate to deal with such a novel situation; in so doing Vitoria clears the way for his own elaboration of a new, secular, international law.

My argument, then, is that Vitoria is concerned, not so much with the problem of order among sovereign states but the problem of order among societies belonging to two different cultural systems. Vitoria resolves this problem by focusing on the cultural practices of each society and assessing them in terms of the universal law of *jus gentium.* Once this framework is established, he demonstrates that the Indians are in violation of universal natural law. Indians are included within the system only to be disciplined.

The problem of cultural difference plays a crucial role in structuring Vitoria's work—his notions of personality, *jus gentium,* and, indeed, sovereignty itself. Vitoria's jurisprudence can be seen to consist of three primary elements connected with this problem. First, a difference is postulated between the Indians and the Spanish, rendered primarily in terms of the different social practices and customs of each society. Second, Vitoria formulates a means of bridging this difference, through his system of *jus gentium* and his characterization of the Indian as possessing universal reason and therefore capable of comprehending and being bound by the universal law of *jus gentium.* Third, the Indian, possessing universal reason and yet backward, barbaric, uncivilized, is subject to sanctions because of his failure to comply with universal standards. It is precisely whatever denotes the Indian as different—customs, practices, rituals—that justifies the disciplinary measures of war, directed toward effacing Indian identity and replacing it with the universal identity of the Spanish. These sanctions are administered by the sovereign Spanish on the nonsovereign Indians.

Cultural difference is also crucial to Vitoria's version of sovereignty doctrine. Vitoria's attempts to outline a coherent vision of sovereignty doctrine in the shifting political conditions of Renaissance Europe encountered a number of difficulties that he tried to resolve by

proposing various distinctions—between, for example, the public and the private, the municipal and international spheres. Each of these attempts fails,[21] however, and ultimately, the one distinction that Vitoria insists upon and that he elaborates in considerable detail is the distinction between the sovereign Spanish and the nonsovereign Indians. Vitoria bases his conclusions that the Indians are not sovereign on the simple assertion that they are pagans. In so doing he resorts to exactly the same crude reasoning that he had previously refuted when denying the validity of the Church's claim that the Indians lack rights under divine law because they are heathens. Despite this apparent contradiction, Vitoria's overall scheme is nevertheless consistent: the Indians who inevitably and invariably violate *jus gentium* are denied the status of the all-powerful sovereign who administers this law.

Clearly, then, Vitoria's work suggests that the conventional view that sovereignty doctrine was developed in the West and then transferred to the non-European world is, in important respects, misleading. Sovereignty doctrine acquired its character through the colonial encounter. This is the darker history of sovereignty, which cannot be understood by any account of the doctrine that assumes the existence of sovereign states.

Vitoria is an extremely complex figure; a brave champion of Indian rights in his own time,[22] he may also be seen as an apologist for imperialism whose works are all the more insidious precisely because they justify conquest in terms of humanity and liberality.[23] My argument, however, is that Vitoria's real importance lies in his developing a set of concepts and constructing a set of arguments that have been continuously used by Western powers in their suppression of the non-Western world, and that are still regularly employed in contemporary international relations in the supposedly postimperial world. In particular, we see in Vitoria's work the enactment of a formidable series of maneuvers by which European practices are posited as universally applicable norms with which the colonial peoples must conform if they are to avoid sanctions and achieve full membership. Vitoria's jurisprudence demonstrates, furthermore, that the construction of the barbarian as both within the reach of the law and yet outside its protection creates an object against which sovereignty may express its fullest powers by engaging in an unmediated and unqualified violence, justified as leading to conversion, salvation, civilization. Non-European peoples have

been continuously characterized as the barbarians compelling the further extension of international law's ambit.

The classic question of how order is created among sovereign states and the framework of inquiry it suggests lends itself to a peculiarly imperialist version of the discipline, as it prevents any searching examination of the history of the colonial world that was explicitly excluded from the realm of sovereignty. The interactions Vitoria examines occur, not between sovereign states, but the sovereign Spanish and non-sovereign Indians. The crucial issue, then, is how it was decided that the Indians were not sovereign in the first place.

Once the initial determination had been made and accepted that the colonial world was not sovereign, the discipline could then create for itself, and present as inevitable and natural, the grand redeeming project of bringing the marginalized into the realm of sovereignty, civilizing the uncivilized, and developing the juridical techniques and institutions necessary for this great mission. Within this framework, the history of the colonial world would comprise simply of the history of the civilizing mission.

Vitoria's account of the inaugural colonial encounter suggests that an alternative history of the colonial world may be written by adopting a different framework and posing a different set of questions. How was it determined that the colonial world was nonsovereign in the first place? How were the ideas of universality and particularity used for this purpose? How did a limited set of ideas that originated in Europe present themselves as universally applicable? How, armed with these concepts, did European empires proceed to conquer and dominate non-European territories? Furthermore, if sovereignty is so intimately connected with the problem of cultural difference, and if it is explicitly shaped in such a manner as to empower certain cultures while suppressing others, vital questions must arise as to whether and how sovereignty may be utilized by these suppressed cultures for their own purposes. The vocabulary of international law, far from being neutral, or abstract, is mired in this history of subordinating and extinguishing alien cultures. By examining these issues as they arise in Vitoria's work we may finally write a different history of the relationship between colonialism and international law and, thereby, of international law itself.

NOTES

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1. On Grotius, see David Kennedy, "Primitive Legal Scholarship," *Harvard International Law Journal* 27 (1986): 1. For accounts of Vitoria's place in the discipline of international law, and his relationship to Grotius, see James Brown Scott, *The Spanish Origin of International Law* (Oxford: Clarendon Press; London: H. Milford, 1934); Arthur Nussbaum, *A Concise History of the Law of Nations*, (New York: MacMillan, rev. ed. 1954). I am also generally indebted to Edward W. Said, *Orientalism* (New York: Vintage Books, 1979) and Edward W. Said, *Culture and Imperialism* (New York: Alfred A. Knopf, 1993).

2. The titles of the two lectures may be translated as "On the Indians Lately Discovered" and "On the Law of War Made by the Spaniards on the Barbarians." The two lectures are collected together in *Franciscus de Victoria De Indis et de ivre Belli Relectiones* 116, ed. Ernest Nys, trans. John Pawley Bate, Classics of International Law, no. 1 (1557; rpt. Washington, D.C.: Carnegie, 1917). "Victoria" is more commonly referred to in the literature as "Vitoria," and I have accordingly adopted the latter version. Citations to paragraph and page numbers are hereafter given in the text.

3. Scott, *Spanish Origin*.

4. Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995), 248; Quincy Wright, *Mandates under the League of Nations* (Chicago: University of Chicago Press, 1930); Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Melbourne: Oxford University Press, 1992), 78.

5. Thus Kooijmans, for example, asserts that the doctrines that applied to relations between European states were simply extended to relations between Spain and the Indies. Kooijmans claims that

> the dealings of the Spaniards with the Indians were subject to the rules that apply to intercourse between states. Vitoria introduced an essentially new element in relentlessly drawing the consequences from the theories that applied in Europe to those territories which until then had remained outside the European horizon. . . . [T]he rules that apply to European interstate intercourse also apply to the intercourse with the American-Indian political communities, because there is no intrinsic difference. The small Indian states are legal persons, they enjoy the same rights as European states.

Koojimans does make it clear, however, that for Vitoria, the Indians would acquire the rights of states once "these communities correspond to the requirements laid down by him for the state." Pieter Hendrik Kooijmans, *The Doctrine of the Legal Equality of States: An Inquiry into the Foundation of Inter-national Law* (Leyden: A. W. Sythoff, 1954), 59.

6. Louis Henkin, Richard C. Pugh, Oscar Schachter and Hans Smit, *International Law: Cases and Materials* 2d Ed. (St. Paul, Minn.: West Publishing, 1987).

7. See, for example, Kooijmans, *Doctrine of Legal Equality*. Kennedy discusses this point at some length.

> Most historians who treat primitive texts do so in a way which both presupposes and proves the continuity of the discipline of international law-reaffirming in the process that the project for international law scholars is and always was to construct a social order among autonomous sovereigns. ("Primitive Legal Scholarship," 11)

8. I use the unsatisfactory term *cultural difference* to denote, broadly, Vitoria's characterization of the Indians as different on the basis of their different social practices, rituals and ways of life. I have also explored the question of the relationship between international law and cultural difference in Antony Anghie, "The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case," *Harvard International Law Journal* 34 (1993): 445.

9. Alfred Rubin, "International Law in the Age of Columbus," *Netherlands International Law Review* 39 (1992): 10–11.

10. Ibid.; Robert Williams, *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990), 45.

11. "From all this the conclusion follows that the barbarians in question cannot be barred from being true owners, alike in public and private law, by reason of the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and land" (Vitoria, *De Indis*, par. 328, p. 125).

12. Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: Cambridge University Press, 1986).

13. Indeed, for Vitoria, it would suffice for these purposes if the Spaniards were obstructed in their attempts to convert the Indians. This affects the "welfare of the Indians themselves," in which event the Spanish may intervene "in favor of those who are oppressed and suffer wrong" (par. 398, p. 157).

14. Pagden, *The Fall of Natural Man*, 1986.

15. Vitoria implies that this is how the Indians may achieve salvation; they must be destroyed in order to be saved. Donne in Holy Sonnet X captures the theme of violence and salvation powerfully:

> Batter my heart, three-personed God; for you
> As yet but knock, breathe, shine and seek to mend;
> That I may rise, and stand, o'erthrow me, and bend
> Your force to break, blow, burn, and make me new.
> I, like an usurped town, to another due,
> Labour to admit you, but oh, to no end,
> Reason, your viceroy in me, should defend,
> But is captived, and proves weak or untrue.

Thus, the argument that a people or a city must be destroyed in order to be saved is a very old one.

16. Vitoria asserts, "Any one, even a private person, can accept and wage a defensive war. This is shown by the fact that force may be repelled by force" (par. 422, p. 167). Thus, while the individual, in exceptional circumstances, exercises rights comparable to the right to wage war, only the state properly enjoys all the rights both to declare war and wage war to its fullest extent.

17. The prince is the entity in whom all power is vested, "for the prince only holds his position by the election of the State. Therefore he is its representative and wields its authority; aye, and where there are already lawful princes in a State, all authority is in their hands and without them nothing of a public nature can be done either in war or in peace" (par. 425, p. 169).

18. "It is, therefore, certain that princes can punish enemies who have done a wrong to their State and that after a war has been duly and justly undertaken the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge" (par. 433, p. 172).

19. It is notable that Vitoria refused to characterize the Indians as slaves in his first relectio. Now, however, with respect to war and the new scheme of natural law he outlines, he achieves much the same result: the enslavement of the whole Indian population, including women and children.

20. Yasuaki Onuma, *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (New York: Oxford University Press, 1993).

21. In the final analysis, as Kennedy argues, Vitoria "does not locate the sovereign between a distinct municipal and international legal order, nor does he distinguish internal and external or private and public sovereign identities" (Kennedy, "Primitive Legal Scholarship," 35).

22. Scott, *Spanish Origin*.

23. Williams, *American Indian*.

Islamic Law and English Texts

John Strawson

English texts do not merely present Islamic law, they construct it. For over two hundred years a body of knowledge about Islamic law has been built not only in the English language but within the Orientalist discourse. Edward Said points out that

> everyone who writes about the Orient must locate himself vis-à-vis the Orient; translated into his text, this location includes the kind of narrative he builds, the kinds of images, themes, motifs that circulate in his text—all of which add up to deliberate ways of addressing the reader, containing the Orient, and finally representing it or speaking on its behalf.[1]

In this essay I will explore some of the English texts that have represented Islamic law and so spoken on its behalf.

The persistence of legal Orientalism is a result of complex ingredients; European power, intellectual credibility and subtlety, as well as racism. It does not merely assert power, but it also uses the superior location that power provides to motivate an intellectual system that necessarily subjects Islam to European evaluation. Law, however, is a very sensitive part of any culture, as it is intimately bound up with legitimacy and rule. It is for this reason that there has been some resistance to the idea that law can be subject to the Orientalist critique. Mayer, for example, claims that "Said's Orientalism is not a concept

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developed for application to the field of law."[2] She argues that it is only applicable to literature, philosophy, and anthropology. Said himself does not deal with law, but in passing says of Sir William Jones that "his official work was the law, an occupation with symbolic significance for the history of Orientalism."[3] By turning to the eighteenth century and the work of Jones and his associates, I think that the symbolic significance of their work will become apparent.

The development of legal Orientalism has taken a path different from those in other cultural fields because of the role law played in colonial rule. In introducing his translation of *Al Sirajiyyah,* Jones makes this clear: "[P]ractical utility being my ultimate object in this work, it has nothing to do with literary curiosities. However agreeable soever, they might have been in their proper places."[4] This motivation has undoubtedly had an impact on the texts themselves. However, it is the way in which these texts have been chosen for translation, compiled and introduced that we find the Orientalist methodology. In explaining the elements of Orientalism, Mitchell writes that by means of "three features—essentialism, otherness and absence—the colonial world can be mastered and the colonial mastery will in turn reinscribe and reinforce these defining features."[5] The need to regulate Islamic law in the interests of colonialism often produces very terse introductions to selected areas of law in an effort to capture it. These texts were mobilized to train a cadre of colonial officials and seduce the Indian Muslims into the orbit of British legitimacy. The overriding aim, however, was to make Islamic law understandable to the English lawyer or official. One nineteenth-century author's explanation of the need for English texts was that "the English student is entirely at sea when he first attempts to master the native text books."[6]

This close connection between colonialism, the practical requirements of government, and the presentation of Islamic law continues to have an impact on current literature. The leading text that continues to influence Western scholars is Joseph Schacht's *Introduction to Islamic Law,*[7] which contains both an overview and a detailed exposition on certain topics. The book is a significant construction of Islamic law in both presentation and definition. In setting the scene Schacht tells us,

> The Arabs were and are bound by traditions and precedent. Whatever was customary as right and proper, whatever the forefathers had done deserved to be imitated. This was the golden rule for Arabs, whose existence on a narrow margin and in an unpropitious environment did not leave much room for experiments and innovations which might upset the precarious balance of their lives.[8]

The Arabs are thus presented in an essentialist way; they are conservative, tied by tradition and precedent. They have been so historically and remain so today. Schacht does not blame the Arabs but explains their culture in mechanistic relation to the hot desert environment. Before he has explained anything about Islamic law, he has insisted that Arabs, from whose culture Islamic law derives, are not like Schacht's readers; Arabs are the Other, not merely distinct, but by their nature resistant to modernism. In this manner he enframes our expectations about Islamic law. So clear is the conservative nature of the Arabs that he claims the sunna, one of the two principal sources of Islamic law, is in fact the hallmark, not of Islam, but of Arab society.[9] "In this idea of precedent or *sunna* the whole conservatism of the Arabs found expression."[10]

The sunna becomes a technical device that prevents an adaptation or development of Arab or Islamic societies, in which "the idea of the *sunna* presented a formidable obstacle to every innovation, and in order to discredit anything, it was and still is enough to call anything an innovation."[11] It is noteworthy that Schacht emphasizes the timelessness of Arab society.

Schacht's representations of Arab society contain a contradiction, as the emergence of Islam constituted a revolution within Arab society. Islam was not only a new religion but was also a new political system that rapidly grew into an empire stretching from the Atlantic to the Gulf. Addressing this historical fact, Schacht clings to his notion of inherent conservatism, observing, "Islam the greatest innovation that Arabia saw, had to overcome this obstacle, and a hard fight that was." He rationalizes away the revolutionary transformation by arguing that "the old conservatism reasserted itself; what had shortly before been an innovation now became the thing to do, a thing hallowed by precedent and tradition, a *sunna.*"[12] In this way Schacht keeps the Arabs in the cultural order that he has assigned for them, and so he sees that the "ancient Arab concept of the *sunna*" becomes "one of the core concepts of Islamic law." Islamic law, like Arab society, becomes essentially fixed in time. Schacht creates a framework in which Islamic law is fixed,

impervious even to revolutionary changes. Unlike Western legal systems, which also base themselves on tradition and precedent but appear responsive to change, Islamic law is frozen. Schacht does not reflect on the paradox that in the United States, where he was a professor, common law is a source of law, and its legal methodology is entirely reliant on precedent.

Schacht also defines Islamic law very strictly, using the concept "in the narrow meaning of the term." While he fails to say what he means, he does explain the scope of his subject:

> [W]orship and ritual, and other purely religious duties, as well as constitutional, administrative and international law have been omitted, the first because they developed under different conditions and in close connection with dogma, the second on account of its essentially theoretical and fictitious character and intimate connection with the relevant institutions with the political history of the Islamic states rather than with the history of Islamic law.[13]

This means that apart from "general obligations" and procedure, Islamic law becomes contracts, inheritance, family, and penal law. It is significant that Schacht dismisses any area where Islamic law might regulate political power, whether national or international. Schacht thus reinforces the notion that Islam is deficient in such areas and Islamic law therefore incomplete and primitive. His reasoning, that these areas are "essentially theoretical and fictitious" and too connected to political history, implies a rather narrow grasp of Western legal systems and evinces no acquaintance with the much-talked-about British constitution.

Schacht has support for this approach from a contemporary, Noel Coulson, who analyzes the legal basis of the Ummayyid and Abbasid states by reference to the constitutional doctrines of the European Enlightenment and found them wanting. On the Ummayyid state (which ceased to exist in 750 C.E.) he comments that it "was not based upon any separation of the executive and judicial functions." Of the Abbasid dynasty, which survived until 1252 C.E. we are told, "the shari'ah courts never attained that position of supreme judicial authority independent of political control, which would have provided the only sure foundation and real guarantee to the ideal of Civitas Dei."[14] Both Schacht and Coulson find Islamic notions of public law lacking in the

essentials of legitimacy, and they establish this deficit by reference to European criteria taken almost as facts. In this they remain true to the legal Orientalist tradition of which they are a part.

Legal Orientalists had not always regarded these municipal and international areas of Islamic law as beyond the worth of study. In the eighteenth century, when the British colonialists in India began their systematic translations of Islamic legal texts, they included these elements of public law as a matter of course. Furthermore, the historians of pre-British India spent considerable effort in attempting to understand the structures of government and constitution in the Moghul Empire. The contributions of these eighteenth-century Orientalists, however, were transformed by the requirements of colonial rule, and in the process Islamic public law was literally deleted from the texts. Schacht's theory of the "theoretical and fictitious" character of Islamic law should be placed in the context of this political practice—an example of what Azim calls "the collusion between the literary text and the process of western political domination."[15]

During the eighteenth century the colonial authorities in India decided that Islamic law would continue to be applied to its Muslim subjects. Under the direction of Sir William Jones the huge task of the translation of Islamic legal texts was undertaken. The most systematic work was Charles Hamilton's translation of *al-hidaya al-marghinani*,[16] the earliest complete Islamic legal text in English. The original dates from the late twelfth century and takes the form of a commentary on Islamic law complied by Ali ibn Abu Bakr Al-Marginani. It has been described as "easily the most popular reference for the Hanafi school."[17] As is the case with such classical works, legal principles and doctrine are developed with intertextual references to the Qur'an and the sunna, as well as to cases argued before courts and to authoritative pronouncements by leading scholars. As the author was such a scholar *(mujtahid)*, he occasionally made authoritative statements himself. The text gives the lie to the idea that Islamic law is particularly rigid or fixed in time. Each topic is discussed through the presentation of the appropriate sources (Qur'an and sunna) and various ways of interpreting and applying them, followed by a discussion of particular cases, a variety of possible solutions to difficult problems, and a general commentary.[18] The work does deal with public law, including international law. Hamilton's explanation of the import of these passages is significant.

> This book contains a chief part of what may be properly termed the political ordinances of Mohammed, and is useful both in a historical and a legal view,—in the former, it serves to explain the principles upon which the Arabians proceeded in their first conquests, (and in which they have been imitated by all successive generations of Mussulmans,) and in the latter, as many of the rules here laid down, with respect to subjugated countries, continue to prevail in all of that description at the present day.[19]

This section of the work (book 9, "*Al-Seyar*—the Institutes") has ten subheadings dealing with a variety of topics that Western lawyers would recognize as international and constitutional law. The topics include the law of treaties, of armed conflict, of occupation, of taxation and elements of government, and of political and religious rebels. Hamilton's argument is that this section reveals something of the core methodology of Islamic jurisprudence.

In 1870 the second edition of the book appeared, edited by Standish Grove Grady. The book has a new purpose; Grady explains that "this work has been made a text book by the Council of Legal Education for the examination of students of the Inns of Court, who are qualifying for the call to the English Bar, with a view to practicing in India." The text also differs from the 1791 edition, for the chapter on public law and international law has been removed: "A large portion of the work having become obsolete, in consequence of the abolition of slavery, and from other causes, I have expunged the books containing these portions from the present edition."[20] In this manner *al-hidaya* appears without the public-law section, and in this form the English edition remains today in circulation as a reference book in South and Southeast Asia.[21]

In the 1791 edition Hamilton is at great pains to introduce his subject to the European reader. He urges that "to enter fully into the spirit of the text, it is required that we keep in mind the state of society in Arabia at the time when Mohammed and his companions began to introduce something like a system of jurisprudence."[22] A full introduction is beyond the capacity of a translator, he remarks, yet his eighty-nine pages constitute, even today, a readable and informed introduction to Islamic law. His scholarly care is indicated by the inclusion of an index of Arabic terms in Arabic script. This index is removed from Grady's edition. Eighty years of colonialism had transformed a classical work of Islamic law into a positive instrument for colonial rule. Despite the

changes to the text, we must not lose sight of the methodology that Hamilton creates in his introduction. Hamilton too is a colonialist, and the purpose of translation is not purely scholarly.

Hamilton's preliminary discourse to the *Hedaya* is groundbreaking in the Western construction of Islamic law. It creates the framework that continues to influence legal Orientalism. Among its elegant phrases and lofty ideals the contours of the Orientalist discourse emerge. Indeed, the text's sophistication perhaps explains the persistence of this critique. Orientalism is not necessarily a crude science. Hamilton's translation is aimed at providing the colonial administration and in particular its judicial branch with an authoritative English version of Islamic law. The practical purpose, though, is not the first issue that he addresses.

> The diffusion of useful knowledge; and the eradication of prejudice, though not among the most brilliant consequences of extended empire and commerce, are certainly not the least important—To open and to clear the road to science; to provide for its reception in whatever form it may appear, in whatever language it may be conveyed:—these are advantages which in part atone for the guilt of conquest, and in many cases compensate for the evils which the acquisition of domination too often inflicts.[23]

These seductive sentiments appear sensitive to the consequences of colonialism, but they are the foundation of the transformation of an encounter between two cultures into an encounter on the colonial terrain itself. Hamilton puts it that "the preservation of what we have obtained depends upon the proper use of power: and the right application of those means which Providence has placed in our hands for continuing, and perhaps increasing, the happiness of a large portion of the human race." Hamilton does not challenge the legitimacy of colonial power, but rather raises the question of how that power will be used, fully aware that the success of the colonial project rests on more than naked force. He comments that "the permanency of any foreign domination (and indeed the justification of holding such domination) requires that a strict attention be paid to the ease and advantage, not only of the governors, but of the governed."[24] In this manner the Orientalist discourse establishes the superiority of European values. The use of knowledge, the happiness of the population, and the interests of

the governed will be judged by colonial interests. It is not necessarily a question of disparaging the culture or values of the Other. It is a question of subjecting them to a particular standpoint.

In this context Hamilton sets out to explore the character of Islamic law. Whereas Schacht sees conservatism and backwardness, presenting it as static, Hamilton understands its dynamism and often indeterminate character. Hamilton's concern is not the conservative nature of Islam, but its falsity. He calls the Prophet Muhammad "the impostor of Mecca" and refers to his "pretended mission." This religious element of Orientalism is pronounced throughout the eighteenth and nineteenth centuries, when Christian missionaries went hand in hand with colonial administrators and were often scholars themselves. In the twentieth century religious concerns have been replaced by an obsession with proving that Islam is backward in inevitably opposing human rights.[25]

Hamilton's judgment is acute, and he is open to presenting Islamic law in a favorable light, even compared to English law. One example is the position of women. "To the political and speculative enquirer," he writes, "the most curious features of this book are . . . the passages which particularly concern women," from which "it appears, that the female sex are, among the Mussulmans, invested with many personal rights and independent privileges." He points to the rights in the Hanafi school that women have with regard to choice in marriage, and their rights to property in marriage "as her exclusive property."[26] This commentary is particularly ironic given the West's current representation of the oppression of women under Islamic law.[27] It is interesting that when Hamilton turns to that other modern image of Islamic law, the mutilations associated with some punishments instituted under the *hudud*,[28] he criticizes them on humanitarian grounds. However, Hamilton has the honesty to admit that "we have nothing better to offer by way of substitute."[29] He is undoubtedly referring to the harsh punishments imposed by contemporary English criminal law, including the death penalty for such crimes as theft. Mutilation may be cruel, but all the colonial power can offer in exchange is public execution.

This approach to the subject demonstrates the strength of the Orientalist method. Its subtlety and sensitivity to the topic lend a degree of intellectual credibility to its contributions. Orientalism does not have to condemn or always find the subject under study inadequate when compared to its Western counterpart. In his fine introduction, Hamilton pays strict attention to historical and linguistic detail. He is

painstaking in his explanations of the disputes among Muslims during the time of the first four caliphs (successors to Muhammad) and the emergence of the split between Sunni and Shi'a. His glossary of Arabic terms is testimony to his assumption that the judges who will use the text will want to see key words in their original. While Hamilton is able to make favorable comments about Islamic law, he seizes what Said calls the "superior location" of Europe. Hamilton judges Islamic law and opens an entire process of judging it. This is not the violence that stamped much of the literature during the great rivalry between Islam and Europe from the seventh century onward. While Orientalism was nourished by these images, such as the crusades, its approach was informed by the power of colonial possession. Hamilton's *Hedaya* is the logical result of the violence of territorial occupation. The kernel of Orientalism is its insistence on the right to subject the Orient and its culture to European judgment, a judgment that during the years of colonial rule the Orient could not ignore. The Orientalist discourse increasingly becomes one of pillars of colonialism itself. It is on this basis that *al-hidaya al-marghinani* becomes Hamilton's *Hedaya* and so is transformed into a tool through which British judges and administrators supervise Islamic law. In this way the British define the scope and purpose of Islamic law.

Hamilton understands that his translation will serve imperial interests wider than the good government of India.

> The advantages to be derived from a development of the institutes of Mohammed are, however, not confined to the administration of justice in our Asiatic territories. The commerce of Great Britain extends to almost every region where his religion is professed, and as this work is a commentary upon the judicial code of the Ottoman as well as the Mogul empire, and is applicable to the customs and judicial regulations of Cairo, Aleppo or Constantinople, as well as of Delhi or Moorshebad,—it can scarcely fail to open a source of desirable knowledge to the merchant and the traveler.[30]

Hamilton presents a refreshingly honest view of Britain's role in the world. He sees his work as both scholarly and practical, assisting in securing his country's imperial role. Hamilton is conscious that a significant ideological task has fallen to him. In his last paragraphs he addresses this issue.

> At the present eventful period, when we have seen new empires springing into birth, and the old indignantly throwing off the long-riveted chains of despotism, the grandest remain fabric of Islamism seems to be hastening to its fall. In expecting this mighty ruin, we are naturally led to inquire upon what principles the fabric was founded, and to what causes we are to attribute its decay. Some parts of the following treatise are particularly calculated to assist us in such an investigation.[31]

Hamilton's text is thus not presented as merely scholarly work, serving as a practical guide for government in India, nor useful in extending British commerce to the Muslim world, but is also evidence of the decayed character of Islam. Hamilton's confidence in the complete collapse of Islam (no doubt reflecting a common view) is, to us, startling. He sees his work as an important historical record of a decaying empire. The paramouncy of Europe is unquestioned.

> We may there observe that, however, sagaciously it might be formed for the sudden extension of dominion, during an age when mankind were involved in the darkest gloom of superstition and ignorance, the Mussulman system, civil and religious, is but wretchedly adapted to the purposes of public security or private virtue. We may observe, with some degree of laudable exultation, its obvious inferiority, in every useful view, to that excellent system that we posses, and which is so admirably calculated to promote the temporal good of mankind, as well as their eternal happiness![32]

In these passages all the main concepts of Orientalism appear: despotism, darkness, superstition, ignorance, inability of the Orient to help humanity to progress, the obvious superiority of Europe and the equally obvious decay of the East. These positions Hamilton does not appear to be under obligation to argue, as he believes that these assumptions will be shared by his readers, more than he believes that the *Hedaya* itself is evidence of backwardness. This is all the more intriguing given his treatment of Islamic law in much of his introduction. His methodological dualism involves presenting Islamic law alongside the theoretical framework of Europe, but Hamilton rarely deploys the latter to pronounce directly on the former. This indicates a high level of confidence at the birth of legal Orientalism. The reader is already on Hamilton's side, and allusions to falsity are enough. Whatever the value of a particular norm of Islamic law, the whole system is invalid. Hamilton's inclusion of the public-law elements does not threaten the legitimacy of colonialism. Rather, their inclusion is part of the process of making Islamic law understandable to the eighteenth-century official. Grady removes them, thinking that the nineteenth-century student would find them unnecessary, possibly confusing. It is also the case that the nineteenth-century administrators would not need to deal with the theoretical issues that they raise, as the right to colonial rule is so firmly established. By removing them, Grady presents an authentic Islamic legal text shorn of an important area of law and its methodology, and so Islamic law appears incomplete. In the hands of the Orientalists the scope of Islamic law is thus subject to constant review. The power of translation merges with colonial power, producing not merely an appropriated text, but an ongoing cultural occupation.

The eighteenth-century Orientalists arrived in India with the European Enlightenment as their intellectual inspiration. This prepared them for the East, armed especially with theory of Oriental despotism. Whereas Christianity stood for gentleness and moderate government, Montesquieu opined, Islam was subject to the "despotic fury of the prince."

> Whereas Mohammedan princes constantly kill or are killed, among Christians religion makes princes less timid and consequently less cruel. The prince counts on his subjects, and the subjects on the prince. Remarkably, the Christian religion, which seems to have no other object than the felicity of the other life, is also our happiness in this one![33]

While civil society exists in Christian Europe, therefore, it is absent in the Islamic East. This theory is explored by the eighteenth-century scholar Alexander Dow in *The History of Hindustan*, which begins with a "dissertation on the origin and nature of despotism in Hindustan," in which Dow reveals a European essentialism. "The faith of Mohommed," he writes, "is peculiarly calculated for despotism; and is one of the greatest causes that must fix for ever the duration of that species of government in the East."

> Governors, magistrates and inferior offices, invested with powers of the principal despot, whose will is law to the empire, exercise their authority with rigour. The idea of passive obedience is carried though every vein of the state. The machine is connected in all its parts, by arbitrary sway, and is moved by the active spirit of the Prince; and levity or oppressiveness of government in all its departments depends on the nature [*sic*] despotism of his mind.[34]

Dow presents a clear picture of society dominated by the state, itself the whim of the prince. Dow explains that "the simplicity of despotism recommends it to an indolent and ignorant race of men." However, he is ready to admit that it "is not so terrible, as men born in free countries are apt to imagine." Indeed, Dow has some difficulty in demonstrating how despotism sits naturally with Islam. He does, however, produce four factors to sustain his argument. The first is the general environment, particularly a hot climate. He claims that Islam gives "unlimited power" to every man over his own family, that the father is "the absolute despoiler of life and death," and that this pattern is reproduced in society a whole—though a strong family system would appear to undermine the state's direct power over individuals, Dow adds two factors that illustrate the lengths to which he will go for evidence: too much bathing and the prohibition on alcohol. "The frequent bathing inculcated by the Coran, has by debilitating the body a great effect on the mind . . . of a bewitching kind." Continuing in this vein, he notes that "the prohibition of wine is also favourable to despotism. It prevents that free communication of sentiment that awakens mankind from a torpid indifference to their natural rights."[35] A dirty, drunken European is the prototype of a free person.

In Dow's text, Islamic facts and European theory jostle each other. In portraying the political system of the Moghul Empire, he has the honesty to picture something rather different than the theory of Oriental despotism would suggest. Rather than law as subject to the whim of the prince, he discusses the "strict impartiality" of the courts established during the reign of Shah Jahan (1627–56). Under the rule of Aurangzeb (1656–1707) a free legal service for the poor was established, whereby the monarch "commanded that men versed in the usages of the several courts, in the precepts of the Coran, and in the regulations established by edicts, should attend at public expense and give their opinion to the poor in matters of litigation." Aurangzeb, we are

told, punished judges severely for "corruption and particularity." Indeed, in the end Dow has to admit that "the courts of justice ran though the same gradations which the general reason of mankind seems to have established in all countries subject to regular government."[36] The main difficulty for Dow and his contemporaries in the colonial administration was their encounter with a sophisticated system of government and law that included principles that the Enlightenment regarded as its own.

> The Mohammedans carried into their conquest a code of laws [that] circumscribed the will of the Prince. The principles and precepts of the Coran, with the commentaries on that book, form an ample body of laws, which the House of Timur always observed; and the practice of ages had rendered some ancient usages and edicts so sacred in the eyes of the people that no prudent monarch would chose to violate either by a wanton act of power.[37]

Dow's commentary indicates that Islamic jurisprudence contained principles for limiting government by law. Painful though it might be for the colonialists to admit, a century before Montesquieu an Islamic society practiced the rule of law.[38] The conquest of Muslim India threw perplexing theoretical and cultural problems to the victors. The Orientalist discourse of this period reflects this quandary, juxtaposing the theory of Oriental despotism with the realities of Islamic rule, side by side. As we saw in Hamilton, this dualism, although inherently contradictory, had the great strength of maintaining historical accuracy while retaining the right to pass judgment. Through this process colonialism legitimized the occupation of territories, peoples, and cultures. It is clear from this brief foray into the literature that Islamic public law was well known in the eighteenth century. Hamilton would have shared Dow's theoretical framework as he set about the translation of the *Hedaya*. Islamic public law was not to be denied; it had to be explained through European values, subjected to its judgment, and thus enframed.

The eighteenth-century Orientalists thus deftly made sense of the world of which they had taken possession. Their statements about Oriental despotism and a reasonably factual record of the Moghul Empire inform one another. The unity of the text brings the Islamic constitutional system into the orbit of despotism, a form of guilt by association.

This process can be seen whether exploring the political and constitutional system or Islamic law in general.

Islamic law had to become explicable and put to use, and understanding Islamic law has to be seen as a process in itself. Reading both Hamilton's and Dow's work, we become aware of the struggle to make sense of Islamic law. A few years before the publication of Hamilton's *Hedaya*, Gladwin explains the purpose of his brief text as conveying "a general idea of Mahammedan law, of which we are little informed."[39] These writers are not conspiring to misrepresent Islamic law but rather are trying to grasp its essence using familiar cultural and legal references. This can also be seen in Jones's introduction to *Al Sirajiyyah*, in which he explains how the Islamic courts used leading authoritative works.

> [T]heir compositions have equal authority in all Mohammedan courts, which follow the system of Abu Hanifah, with those of Littleton and Coke in the Courts at Westminister; and there is a wonderful analogy between the works of the Arabian and English lawyers, and between those and their several commentators; with this difference in favour of own country that Littleton is always too clear to need a gloss, and with this difference in favour of the Arabs, that sole object of Sharif was to explain and illustrate his test, without any display of his own erudition.[40]

In this manner Jones orders the way of looking at Islamic law through English legal idioms. In so doing he establishes a method that was to be followed, not merely by the British, but also by many Indian Muslims in the century and a half that followed, so that Islamic law became encapsulated within an English framework.[41] Drawn onto English cultural territory, Islamic law can be understood and rescued from the alleged chaos and despotism of the Orient. This is of course more than just creating familiarity for British officials or indeed the general public. At the initial stages of colonial occupation Islamic law is enframed in English law through the identification and translation of key texts. Jones explains that as a practical manner "if we give judgements only from native lawyers and scholars, we can never be sure that we have not been deceived by them."[42] The colonial representation of Islamic law becomes not merely an inevitability but a necessity. The

colonial practice interacts with legal theory and so shapes its object of study. It is from this source that legal Orientalism merges with Western jurisprudential lineages and seems so naturally a part of them.

The rise of Islamist militant politics in much of the Muslim world during the past two decades has created the basis for new encounters between Islam and Europe. This has particularly important implications for the field of law, where as Mallat remarks, "the concerns of the Islamist advocates has primarily taken legal form."[43] The creation of Islamic states in Iran and Sudan, Islamic upsurges in Algeria and Egypt, and discussions on the role of *shari'a* in most Muslim countries raise critical questions about the relationship between Islam and world order and between Islamic law and international law. At the present time this encounter remains trapped within the postcoloniality of international society. Mayer reflects this problem quite clearly when she says that "the principle of the supremacy of international law is a given in world order," and that international law rests on "Western traditions of individualism, humanism and rationalism."[44] Mayer's arguments are not merely theoretical but inform current practice in this area. In the dispute between the United Nations Human Rights Commission and Sudan, Professor Gaspar Biro (author of the Report on Sudan) responds to his Sudanese critics by commenting that "in terms of human rights, the only question is whether or not national legislation is compatible with existing international instruments."[45] Mayer's and Biro's comments represent both the violence of positivism and postcolonialism, neither of which serves the victims of abuses in Sudan or other parts of the Islamic world. Their assumptions of the natural superiority of the West in human-rights matters not only defies historical record but is built on the colonial constructions of Islamic law. In portraying human rights as essentially Western they and their Islamist opponents enter in a tragic collusion that sustains the parochialism of law. In reaching beyond our postcolonial world, both sides of the former imperial divide have every interest in constructing a new jurisprudential discourse on an inclusivist basis. In challenging legal Orientalism we are not only able to rethink our images of Islamic law but to discover rich lineages for a universal jurisprudence. Rereading Islamic legal history outside of the walls of Orientalism can be a significant contribution to this process. In reflecting on these issues Springborg's comment on life in an Islamic community in the early Middle Ages is refreshing.

> Far from being victims of Oriental despotism, the average citizen in these communities enjoyed a degree of legal and economic freedom, personal and corporate rights and immunities which compares favourably with those of the citizen in the modern "democratic" state.[46]

NOTES

1. Edward W. Said, *Orientalism* (Harmondsworth: Penguin Books, 1978), 20.

2. Anne Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (Boulder Colo.: Westview Press, 1991), 10.

3. Said, *Orientalism*, 78.

4. Sir William Jones, *Al Sirajiyyah* (Calcutta: Joseph Cooper, 1792), iv. This is a classical work on the Islamic law of inheritance according to the Hanafi School, and was one of Jones's great achievements. The work itself comprises a preface by the translator, his translation of the commentary on the law, and the original Arabic text. The Hanafi School is one of the four schools of Islamic jurisprudence of the Sunni branch of Islam, named after Abu Hanifa (700–767 C.E.) ,whose school was based in Baghdad.

5. Timothy Mitchell, "Orientalism and Exhibitionary Order," in *Colonialism and Culture*, ed. Nicholas B. Dirks (Ann Arbor: University of Michigan Press, 1992), 289.

6. Standish Grove Grady, *A Manual of the Mohammedan Law* (London: W. H. Allen, 1869), xxx.

7. Joseph Schacht, *Introduction of Islamic Law* (Oxford: Clarendon Press, 1964). His influence can be seen in many current works. For example, it is relied upon by Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Cairo: American University in Cairo Press, 1993), 88–93.

8. Schacht, *Introduction of Islamic Law*, 17.

9. Islamic law *(al-shari'a)* derives from two main sources, the Qur'an, believed by Muslims to have been revealed to the prophet Muhammad (between 610 and 632 C.E.) and *al-sunna*, which are the traditions of the Prophet and his companions. Both sources were originally oral, but after the death of Muhammad, the Qur'an was committed to writing. *Al-sunna*, which comprises thousands of reports, were collected together in six authoritative written versions in the ninth century C.E. Schacht's theoretical framework implies that he is examining "Arab" rather than Islamic law, and indeed he approaches his topic like the legal anthropologists (e.g. Hoebel, Gluckman, Bohannan, Cory).

10. Schacht, *Introduction of Islamic Law*, 17.

11. Ibid.

12. Ibid.

13. Ibid., 112.

14. Noel Coulson, *History of Islamic Law* (Edinburgh: University of Edinburgh Press, 1964), 120, 121.

15. F. Azim, *The Colonial Rise of the Novel* (London: Routledge, 1993), 5.

16. Published under the title *The Hedaya*, 4 vols. (London: T. Bensley, 1791). Its original title is *al-hidaya fil forou*, which means "guide on particular points." Hamilton's translation is from a specially prepared Persian version of the Arabic.

17. Sobhi Mahmassani, *Falasafat Al-Tishri Fi Islam* [The Philosophy of Law in Islam], trans. Farhat J. Ziadeh (Leiden: E. J. Brill, 1961), 49.

18. Islamic law is developed through a series of discourses that resulted in the formation of various schools of law, each with their distinctive approach to particular issues. The major texts therefore contain aspects of this discourse. It is because of the diffuse character of the *shari'a* that it has proved very difficult to codify. While modern Islamists call for the straight path of Islamic law—*al sirat al mustaqim*—any research into classical Islamic law finds a pluralism within the jurisprudence that makes any straight path improbable. It is significant that colonialists and many subsequent Western commentators have, however, found it politically convenient to adopt an approach that has much in common with today's Islamists,

19. *The Hedaya*, 1:lxxi–lxxii.

20. Charles Hamilton, *The Hedaya: A Commentary on the Mussulman Law*, 2d ed., with a preface and index by Standish Grove Grady (London: Wm. H. Allen, 1870), iv. Grady used this edition to teach his course in Islamic law at the Council of Legal Education during the 1870s.

21. At least two editions reproduce the 1870 version of *The Hedaya*. One is Charles Hamilton, *The Hedaya or Guide* (Lahore: Premier Book House, n.d.), the other, Charles Hamilton, *The Hedaya: Commentary on Islamic Law* (New Delhi: Kitab Bhavan, 1985). Part of the section dealing with public law in the introduction is retained, and a note explains that "this book has been omitted, as it has hardly any practical effect" (Hamilton, *The Hedaya: A Commentary on the Mussulman Law*, xviii).

22. *The Hedaya*, 1:xxxix.

23. Ibid., 1:iii.

24. Ibid., 1:iv.

25. See John Strawson, "A Western Question to the Middle East: Is There a Human Rights Discourse in Islam?" *Arab Studies Quarterly* 19, no. 1 (1997): 31–58.

26. *The Hedaya*, 1:lxiv, lxv.

27. This can be seen in the way in which the Western media portray the discriminatory policies of the Taliban in Afghanistan as the inevitable result of the application of Islamic law to women, despite the opposition from many Islamic societies, including Iran. This serves the purpose of claiming that the West is the defender of women's rights. For an alternative reading on Islam and women, see Fatima Mernissi, *Islam and Democracy: Fear of the Modern World*, trans. Mary Jo Lakeland (London: Virago Press, 1993), 149–71.

28. This is one of the three categories of crime in Islamic law that comprises six offenses: *sariqa* (theft), *haraba* (rebellion or highway robbery), *zina* (fornication), *qadhf* (unproven accusations of fornication), *sukr* (intoxication), and *ridda* (apostasy). Once the offenses have been proved, fixed penalties must be applied; these include mutilation, corporal punishment, and death.

29. *The Hedaya*, 1:lxxi.

30. Ibid., 1:lxxxvii.

31. Ibid.

32. Ibid.

33. Montesquieu, *The Spirit of Laws*, trans. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 461.

34. Alexander Dow, *The History of Hindustan*, 3 vols. (London: T. Becket and P. A. De Hondt, 1772), 1:xiii, xv.

35. Ibid., 1:xxi, xxii, xiv, xvi.

36. Ibid., 1:xxvi, xxvii, xxix.

37. The essay entitled "An Enquiry into the State of Bengal," ibid., 1:lii.

38. For a contemporary and exciting study of the theory of Oriental despotism and the reality of the East, see Patricia Springborg, *Western Republicanism and the Oriental Prince* (Cambridge: Polity Press, 1992).

39. F. Gladwin, *An Epitome of Mohammedan Law* (Calcutta: William Mackay, 1786), v.

40. Jones, *Al Sirajiyyah*, iii. By "test" he seems to mean investigating the logic of the argument. Sayyid Sharif was one of the authors of *Al Sirajiyyah*.

41. There are many texts that, although quite scholarly and replete with Arabic references, are essentially within this mold; see for example, Seyed Ali Ameer, *Mohammedan Law* (Calcutta: Thacher, Sprink, 1892); Abdur Rahim, *The Principles of Mohammedan Jurisprudence* (Calcutta: Baptist Mission Press, 1905); and Badruddin F. Tayabji, *A Handbook of Muhammadan Law* (Mylapore: Madras Weekly Notes, 1914). There could be readings of these texts that see them as subversive of colonial rule in that they usually begin with excellent introductions to Islamic law and then change track into a positivist exposition that seems unrelated to the former.

42. *The Letters of Sir William Jones*, ed. G. Cannon (Oxford: Clarendon Press, 1970), 2:795.

43. Chibli Mallat, *The Renewal of Islamic Law* (Cambridge: Cambridge University Press, 1993), 1.

44. Mayer, *Islam and Human Rights*, 209, 44.

45. Quoted by Paul Lewis, *International Herald Tribune*, March 9, 1994. This does not imply any support for Sudan's interpretations of Islamic law. For an alternative but Islamic view of Sudan see Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Cairo: American University in Cairo Press, 1992), 125–36.

46. Patricia Springborg, "The Contractual State: Reflections of Orientalism and Despotism," *History of Political Thought 8* (1987): 399.

The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law

Annelise Riles

When I first became acquainted with the country the natives thought their country the biggest in the world. When new-comers differed from them on this point, they roundly called them liars. That was fifty years ago, and in the meantime the slow but steady pressure of education afforded by the Mission Schools has taught them otherwise.

A. B. Brewster, *The Hill Tribes of Fiji*

The countryside, the immense geographic countryside, seems to be a deserted body whose expanse and dimensions appear arbitrary (and which is boring to cross even if one leaves the main highways), as soon as all events are epitomized in the towns, themselves undergoing reduction to a few miniaturized highlights.

Jean Baudrillard, "The Ecstasy of Communication"

The representational gaze has by now become a ubiquitous motif of scholarship about colonial law and administration. Following the insights of Michel Foucault and recent trends in feminist theory, numerous writers have turned their attention to the perspective that often animated colonial rule.[1] In the pages below, I wish to contribute to this line of inquiry by considering the sense of dimension or scale that characterized the international legal project of the colonial era.[2] An implicit notion of scale—of the difference between large and small—is

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