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## **The Idea of “Law” in the Iranian Tanzimat Period**

*Dr. Mohammad Hadi Ahmadi*

*PhD of Political Science, University of Tehran, Tehran, Iran.*

*hadiahmadi@cmess.ir*

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### **Abstract**

To seek the intellectual roots of the Iranian constitutionalism, one has to be back to the pre-constitutionalism epoch. Indeed, in that time, Iranian elites had recognized the "deterioration" as the main crisis of Iran, which was rooted in the problem of "despotism." Their strategy to overcome this crisis was the "Law." However, the key point was that the majority of intellectual elites had thought codifying the law is the only job that has to be done. Nevertheless, they did not pay attention to the mechanism of how to move from traditional legal logic to the new one in Iran. In the Iranian Tanzimat period, considering the two concepts of law in the European lands (the political and the rational concepts), the idea of law seems to base on the rational concept. In that time, debates were on the explanation, justification, and interpretation of the law. All the utterances were about: which law is the right one? What is the proper criterion to pass a legal regulation? Must the law be written based on nature, the tradition, the practices, or the divine Sharia? This article is going to assess the represented hypothesis by investigating some works of intellectual elites and historical documents of Iranian pre-constitutionalism.

### **Keywords**

Law, Arbitrary Monarchy, Regulated Monarchy, Iranian Intellectuals.

## Introduction

The beginning of the modern reformation epoch in Iran can be considered from the Safavid to the constitutionalism movement. This epoch can be divided into some basic parts per se. Javad Tabatabaei remarks the beginning of the deterioration from the defeat at the Chaldiran battle; he believes that from this moment until being defeated by Russia in the Qajar must be investigated as an independent period, the "Transition Epoch" (Tabatabaei, 2001). Explaining the political thought of this period is possible through the "logic of failure," and describing the intellectual and power elites' efforts to solve the crisis can be based on the "Arbitrary Monarchy" discourse. From Tabatabaei point of view, although the beginning of Safavid reign, based on the history and history of thoughts, has coincided with the revolution of western thought and the globalization of political relations so that Iran found itself in this turbulent valley of new relations and thoughts, yet it should not be presumed that Iranian political and intellectual system has got a new nature in accordance to the modern developments. Indeed, from this moment to the three centuries on, there is a controversy between appealing western modernity and rejecting it. The Iranians, more than to approach toward the modernity, "put their steps in muds of thinking on the reign tradition of time and the tribal-ethnic despotism of alive and living forces of their culture and civilization." He believes that this period is the middle ring of Iranian thought history in medieval centuries and the beginning of the new epoch, i.e., after the being defeated by Russia in the Qajar (Tabatabaei, 2001).

The period of the coming to power of the Qajar kings should be seen as a time when Iran is on the brink of declining traditional thought and moving towards a change in thought and practice until it finally reaches a constitution. The key point in this period began with the two-round battle between Iran and Russia in the Fath-Ali Shah reign. Iranian's failure in these wars is the point of thought and practice change, as well as their awareness of the decline of an "old system" and the situation of "deterioration." The course of

the history of Iranian political thought at this time consists of several stages:

1. Period of crisis in the arbitrary monarchy: this period initiates before the Qajar, from the late Safavid reign. The signs of political system frailty and its inefficiency appears, part of which has been explained as the "Transition Period." The rest of this time is, historically, from the late of Fath-Ali Shah reign until 1264 AH. The structure of the political system and the logic of political thought at the end of this period are firm on the sultanate system and the idea of an "Arbitrary Monarchy." Arbitrary monarchy is based on the concentration of power in the hands of the king and the importance of the king himself. According to the first principle, all political, social, and religious dispersal is being integrated into the favor of the state. Based on the second principle, the king is the center of the political authority and the implementation of Sharia and customary law. The king's authority in the idea is absolute and independent, and the only practical limit is the observance of the Sharia.
2. Regulated Monarchy period: this period, which is known as the era of Tanzimat, initiated gradually from the ministry of Amir Kabir (1267 AH), soared in the ministry of Mirza Hosein Sepahsalar (1278 AH), and thrived in 1297 AH. The king was still the center of authority, but the authority was assigned to the ministers and the apparatuses, which the king himself established. As a matter of fact, the area of the king's authority was exercised in particular ways. Since the governance had been transferred from the king to the apparatus, the issue of organizing and managing the apparatus was raised, and the necessity of drawing up guidelines for the unification of the practical procedure became apparent.
3. Post-Tanzimat period: it is the third period, which starts from 1298 AH to 1309 AH. In these years, the order of Tanzimat reformations has been broken, and somehow, the will of arbitrary monarchy's followers has revived so that they have got the power. The year 1309 AH coincided with the Tobacco Protest, which is considered as a turning

point in the political thought history of Iranian and caused the changes in the thought and practice of political thought logic.

4. Constitutional threshold and the stage of lawmaking: this period is from 1309 AH to 1324 AH. The feature of this era is the crystalizing of lawmaking discourse, which has three traits: First, the religious aspect of the discourse becomes very bold. Second, it is represented by a group in the middle of traditionalists and Westernists; they have some representatives both in cleric scholars and intellectuals. Next, the last but the most important, the group criticizes two things: on the one hand, as they believe the main problem and crisis of the country roots in the despotism, they are criticizing it. On the other hand, they are criticizing those who just believe in western modernity and follow it unilaterally whilst denying the past and the tradition completely. The third group seeks to combine the tradition with modernity. That is why the discourse of lawmaking with this group becomes a "problem."

This article seeks to examine the idea of law in the eyes of some Iranian pre-constitutional intellectuals. This is done by using the genealogy method and the theoretical benefits of Foucault's concept of "governmentality." The concept of governmentality introduced in Foucault's later works examines how the reason for governing is formed. Foucault himself uses this concept for the "genealogy of the modern state" (Foucault, 2008). He defines the government as "to conduct"; or more precisely as a "conduct of conduct." This concept has been obtained from two other concepts, "governing the self" and "governing the others." Governmentality means to study "the reasoned way of governing best and, at the same time, reflection on the best possible way of governing" (Foucault, 2008). From the Thomas Lemke view, "Foucault uses it exactly to analyze the connections between what he called technologies of the self and technologies of domination, the constitution of the subject and the formation of the state" (Lemke, 2000). The study needs to first explain the logic of the crisis in the arbitrary monarchy and the transformation of it to the regulated monarchy, and then pursues the evolution process of the idea of lawmaking in the eyes of some intellectual

elites and political institutions.

### **Crisis in Governmentality of Arbitrary Monarchy**

From the half-life of the Qajar dynasty to its end, the Iranian intellectual situation agitates with the issue of "despotism," as well as the entrance and the penetration of European intellectual discourses, and gradually is facing the violent and colonial aspect of western civilization. Iranian, as well as the other Muslim countries, confronting Western modernity, are divided into different groups. One group insists on the traditional thoughts while rejecting the reason for western modernity utterly. On the opposite, the second group fundamentally sees the problem in the traditions while totally denying it, in the name of reactionary tradition, whatever existed and sought the westernization. However, there is a third group in the middle of the two other groups, a critic of both the tradition and the West. They emphasize, of course, the religion and the modernity, so are in pursuit of a middle way in order to synchronize between the fundamentals of the old and new identity. For the group, the new way is to come back to Islam by codifying the law. Indeed, the previous groups basically did not face the problem of "law." The first group, based on the logic of traditional thought, considers the continuation of the Sharia-monarchical legal system appropriate. The second group, in general, sees the problem in everything traditional and what is coming from the past and seek to make a gap with the past; thus, they consider the full adaptation of the legal-political system of the modern West appropriate to the condition of the backward Iranians.

However, the third group, which has both a sense of identity heritage and an observer of the advancements of modern western civilization, is, of course, a critic of both. Consequently, they seek to find a way to formulate a kind of positive law and, in particular, write a constitution inspired by Continental European and French intellectuals. In this group's thinking, administering the state mainly is based on the written laws rather than the English module that the common-law consider. This solution that, according to Foucault, come from Rousseau, is a kind of French legal radicalism. This

approach begins with human rights to end the limits of the state governing through the dominant constitution. They consider the origin of human rights to be natural and accept it after stating the ideal or historical reasons and foundations for these restrictions.

This approach also is about two types of transferable and non-transferable rights. The latter is not possible in any way to waive by any government. Thus, in this approach, the rights separate firstly, then the scope sovereignty and the right of sovereignty are distinguished, and finally, the competence of authority of sovereignty is inferred in a given framework (Foucault, 2008). It is noteworthy that the pursuit of this idea in Islamic countries leads to a crisis of "writing law." As the group moves from traditional Islamic governments with Islamic Sharia standards to a modern state with positive-law centered, falls into the trap of writing law and the trouble of converting religious *fatwas* into legal codes. This group finds two narratives among Muslims: a Sunni narrative and a Shiite one.

In contrast to the Sunni's epistemological discourse for which entering to the modern state uses concepts of Measurement and Consultation (Qiyas and Shura), the Shiite discourse had trouble with Measurement, as well as Consultation and Election. Consultative fatwa had no authority in Shia's *Fiqh* and was not validated yet. Even the majority in the fatwa was not accepted too. The Ijtihad tradition of Shia's *Fiqh* was individual. The principles (*Al Qawaid*), elicited from the texts, were local principles, and to make them general, the question arose which fatwa should be the criterion? However, preferring one's fatwa over someone else was against the main principle.

The aftermaths of Iranian defeat by Russia, beyond the military issues, are taken into account like a turning point in the history of the idea and evolution of Iranian awareness. It is at this time that the Iranians realize the inefficiency of the "old plan" and are thinking of devising a "new plan." Although, initially, a few political elites of the Tabriz governorate fall into this dilemma and seek a solution, but as the crisis deepens, a rift broke out between traditional Iranian thought and their routine practice (Tabatabaei, 2006), and the

idea of reform gradually is extended beyond military issues to include educating and establishing new institutions to restructure the political system.

The foundation of all reforms and renovations, done by the first political elites of Iran, such as organizing, ordering, and updating the militaries, establishing the military schools, financial regulating and court restructuring, spreading out some modern sciences, developing Dar ul-Funun, even initiating the newspapers and press, all were in order to organize the political system and more efficiency discipline government officials. These reforms, of course, did not include the sultan person, and all of them meant, first and foremost, the preservation of the monarchy and the excellence of grandeur.

The reason for these kinds of reforms roots in the political order based on the reasonability of monarchical governing. In the monarchical systems, the governmentality was based on the "sultan". The sultan's rule was only limited to two things: the Sharia and the observance of subjects' interest. The latter mean, in fact, was the one that the sultan saw fit to maintain his power. Therefore, there was practically no external or binding condition on the sultan's absolute independence and authority. The sultan, acting as the father in charge of the child at the head of the family, had the task of doing whatever was right for the benefit of the child/subject. No authority had the right to interfere with the sultan's jurisdiction. Unlike modern systems, in which the sovereign's powers are limited to specific legal frameworks and externally required surveillance, this method of governance has no external enforcement guarantee. The result of this kind of governance was the emergence of the "despotism" problem.

This sense can be obtained through western travelogues visiting Iran. The description of Sir John Malcolm, who visited Iran in the early 19<sup>th</sup> century, is like this: "rights and laws, institutions and theories of control and balance could in no way limit the king of Iran, and so he was one of the most despotic kings in the world" (Abrahamian, 2000).

After the first generation of well-wishing, political elites, such as Abbas Mirza, Ghaem Magham Farahani, and Amir Kabir, are unsucceeded and eliminated from the process of reforming and modernizing Iran's socio-

political structure, Nasser al-Din Shah is thinking of continuing the reform project. After the removal of Mirza Aga Khan Nouri, he contemplates the modernization of the state apparatus and the establishment of new institutions based on the principles of progressivism, so that he can both authenticate the monarchy and respond to the demands of the people for the severity of the unbound tyranny of the rulers and government officials. From then on, a change in Iranian governance appears.

Although all Nasser al-Din Shah's reforms, in this period, are due to the preservation of the "Arbitrary Monarchy" structure, yet in the end, his modernizations lead to a change of the sultanate structure in benefit of "Regulated Monarchy." At first, Nasser al-Din Shah tried to handle the crisis of despotism by appointing some ministers and determining their powers and duties. In order to do this plan, he put six ministers at the head of six new-established ministries and named it "Council of State." In the Shah's decree to the Council of State, their duties counted as follows:

1. Promoting the monarchy and inhibiting the concentration of power in the hands of one person named Prime minister;
2. Establishing order and discipline in estate (*mamlekat*) affairs;
3. Taking care of the estate affairs thoroughly and paying attention to the public affairs of the Guarded Domains (*Mamâlek-e mahruse*) residents;
4. Training the estate and the government;
5. Adding treasury funds and livelihoods of subjects (Zargarinejad, 2003).

The decree recognized the independence of each ministry, meanwhile, emphasized on inter-ministers consultation in important matters and gradually said: "However, the whole matter is signed by the Self's blest and exquisite, without the concealment and permission of dignified august Shah cannot obtain credibility" (Zargarinejad, 2003).

Shortly thereafter, because the ministries needed instructions, the king in *Rabia al-Thani* 1276 AH ordered to establish a parliament called the "Expediency Council, " consisting of a number of princes and courtiers, consulting on important matters of the country and making decisions to "regulate all affairs and prosperity of the estate and the government"



(Zargarinejad, 2003).

The process of establishing modern institutions continued in the following years as well. For example, the Court of Justice, the General Assembly, the House of grand Ministers that was the same as the *Dar al-Shora*, the House of Ministers, the House of Good Adjustments, the Justice Fund, and the government Investigative Assembly were founded to deal with people's complaints about the arbitrariness of rulers' behaviors and government officials (Zargarinejad, 2003). What revealed by all these projects of establishing apparatuses was that the level of all the modernization and reformations were to observe the expediency of the arbitrary monarchy and was included everyone except for the king.

### **The First Legislative Attempts**

The king's demand for modernization, for the first time, led to some intellectuals continue the attempts of promoting new political and social ideas and write some works in order to reform the political and social issues, which the number was over 150 treatises (Zargarinejad, 2003). Indeed, it should be said that the demand for modernization formed from the top, not the bottom. The process of modernization initially began from establishing apparatuses, and some time later, the ideas of modernization shifted to the intellectual foundations, that is, the idea of lawmaking. During this process, the institution transformation continued from the House of six ministers to the House of the nine and then to the twelve and eventually to the fifteen ministers, and the House of Expediency converted to the Grand House of Council (*Dar al-Shura Kobra*). The development of these institutions brought the political and intellectual elites to the thought of writing guidelines and preparing booklets for government institutions. These were the first attempts at "lawmaking" (Zargarinejad, 2003).

The most long-lasting institutions were the Council of Government and the House of Expediency, which remained more or less and at least ornamentally, until the constitutionalism. Nasser al-Din Shah's interest in these institutions led to discovering the importance of these institutions in

advancing absolute monarchy to the consultancy by many progressive elites. Therefore they started thinking about drafting laws.

The idea of lawmaking, indeed, was a sign of transformation from a period to another. While in the arbitrary monarchy, the end of the reformations and modernization was to the extent of establishing several restricted ministries and responsiveness of ministers to the minimal demands of subjects, the expansion of the sultanate disorder had emerged the necessity of deeper reformations. For this reason, the development of governing apparatuses was on the agenda, and administering these apparatuses highlighted the need to adhere to a uniform and a given criterion for adopting the same practice.

All these changes signify the entry of governance into the period of the "Regulated Monarchy." In this method, although the king is still the axil of governing and the implementation of any reformations and changes just is possible from top to bottom and through the consent of the king, carrying some reformations out to preserve the sultanate highlights the need for the change of power structure. In the new governing, the sultan is forced to establish new organizations and distribute power. The king, to enforce his power, has to proceed through the ministry entity. Somehow, the king restricts his channels of power into some organizations that are set up by himself. In other words, there is some form of power assignment.

### **The Idea of "Law" in the Tanzimat Period**

Until the time of the Iranian constitution and the theoretical opening of political jurisprudence by the late Mirza Mohammad Hussein Naini literature, Iranian society had somewhat struggled with the question of law. According to Hajj Sayyah, "in general, the nation was gradually awakened and informed, respiring about the law and the rights of the state and the nation" (Sayyah, 1957). Haj Mirzam Mohammad Khan Majd al-Molk Sinaki, Sheikh Hadi Najm Abadi, Mirza Malkam Khan, and Mirza Yusuf Khan Mustashar al-Dawlahare among such literature. These are the very third flow elites who are critics of tradition and imitation of the West in the face of traditionalists and westernists. The basis of the discussions of these intellectual elites in the

Tanzimat period can be summarized in three points:

1. The Iranian government has no law; the underlying cause of Iran's backwardness is the lack of law as well;
2. There is no proper understanding of the situation in Iran. Particularly on the part of some Westernists, whom Majd al-Molk refers to as Iranian ostriches that, on the one hand, view the Iranian nation as inferior and, on the other hand, are constantly criticizing the government and seeking to destroy it (Majd al-Molk, 1942).
3. The third point of this group is that the rule of law must be based on the Sharia.

#### **Majd al-Molk and the Description of Muddle Crisis**

Mirza Mohammad Khan Majd al-Molk Sinaki (born 1224 AH), known as Majd al-Molk, was the niece of Mirza Aqa Khan Nouri and the father of Mirza Ali Khan Amin al-Dawlah (ancestor of Ali Amini). He was a servant of Muhammad Shah's mother during the early reign of Nasser al-Din Shah and came to the ministry after undergoing some stages of public service (Arianpour, 1971). He is the patriarch of the Amini family in the Qajar era, who lived during the Tanzimat and faced the crisis of Iranian society, considering the "law" the only solution. "Treatise of Discovering Oddities in Wonder Things" (*Kashfo al-Gharib fi al-Amur al-Ajaib*) is a major work by him in 1287 AH (Arianpour, 1971). At the beginning of the book, he quotes a poem that illustrates the situation of people like him in critical and turbulent times in Iran. He describes himself as a mute and hallucinated person and all the other people in the world as deaf; thus, neither he can talk nor the people can hear (Majd al-Molk, 1942).

Majd al-Molk and his associates are very confused and turbulent in the intellectual state of their time. He writes in describing the Iranian crisis as:

The tangible descends and chronic illnesses are infected the Iranian state continuously from the inactive headship, have promised all the residents of the guarded domains a great occurrence that would not exclude anyone from its aftermaths. The tradition of justice and fairness is everywhere

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admired, and its benefits become visible, which are the comfort of God's creations and the prosperity of the state and the good of the estate. In Iran, this custom has been abandoned, and fires of heresy have become clear, and the flames have risen to such a high degree that it is found all over the world and is about to warm up; That is to say, in the warm Iranian nature produces a disease that is beyond the reach of the Iranian physicians. The symptom of the disease will be deduced from the same little description that has been made by the members of the government headship (Majd al-Molk, 1942).

The above text is a clear indication of Iranians' awareness of their "crisis" status. On the other hand, the literature on crisis explanation is derived from medical literature and metaphors. This literature, which has been abundant in pre-constitutional writings and may have been the dominant form of intellectual literature, reveals some points. It can be said that the use of the medical terms in the pathology of the social-political affairs of Iran in the run-up to modernity derives from the history of traditional medical science in Iran and the familiarity of Iranian people with this literature and its terms and concepts. Therefore, in the intellectual literature, this is the most appropriate method available to the public for its metaphorical use in recognizing the crisis of the time.<sup>1</sup>

Majd al-Molk believed that the basic reason for the acceptance of the Islamic Sharia in Iran and by various tribes is its positive and beneficial function. Even non-Muslims were eagerly embracing Islam. However, the current Sharia is a mixture of the habits of different tribes that have ruled

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1. However, in the literature of the Islamic Revolution of Iran, more than half a century of acquaintance with the new sciences including engineering had passed, and the Iranians in this field had made progress. Another point is that the metaphor of engineering in the literature of the Islamic Revolution discourse may also indicate that the dominant thought in the Iranian mind, as a result of a rift between the foundations of modernization with Iranian culture, was engineering. Therefore, the humanities have been weakened and the purpose of the development just was the superficial modernization that has been shown in engineering science. This, compared to the medical literature of the constitutionalism, may indicate that the constitutionalists are more dependent on the Islamic intellectual tradition and humanities. Because the science of medicine has always been of interest to philosophers.

Iran for some time. The genuine and useful jurisprudence and sharia must be revived.

The Iranian government is not similar to the Islamic law, nor the rule of other nations and governments. We should say that it is a government composed of Turkish, Persian, Tatar, Mongol, Afghan, as well as Roman customs, mixed and united, and a unique sphere with great chaos that has overwhelmed Iran by one of these tribes over the centuries. From each tribe, the habit of abomination and obscene remains in Iran, and all of those habits are fully flowing in this era (Majd al-Molk, 1942).

### **Najm Abadi and the Efficiency of the Islamic Law**

Majd al-Molk's similar argument is also made by Najm Abadi. Sheikh Hadi Najm Abadi (1250 AH) in the book "Liberation the Wises" (*Tahrir al-Oqala*) introduces a discussion on the virtues of Islam. He believes that the acceptance and spread of Islam are basically due to its efficiency, not its legitimacy (*Haqaniyat*). He states that in the early of the advent of Islam and the establishment of the prophetic government, the infidel groups willingly migrate to Islamic lands to live under the rule of the Islamic State. However, this trend is reversed nowadays, and Muslims want to live in the land of blasphemy.

According to Sheikh Hadi, this has to do with the issue of justice in government. As politics in Islamic society was based on justice and treated everyone with goodness, it was sublime and superior. When the infidels saw this as well, had become interested in Islamic society. But nowadays, because justice is flowing in the lands of blasphemy and the people are at welfare there, everyone tends to travel to and live in those lands. Justice in the blasphemy lands is not fulfilled except by law. Whilst we have the best and most complete laws in Islam, and if the kings and elders of politics follow the rules and the method of Islam and the Prophet government (peace be upon him), then comfort, security, prosperity, as well as progress to the Islamic land will be restored (Najm Abadi, 2011).

The remarkable point is that in the Najm Abadi literature, there is basically no theological discussion. He is extremely rational and practical and directs reforms to the government. Also, in his view, religion and politics are coherent; thus, the law must not only be based on the Sharia but also be beneficial (Najm Abadi, 2011). Najm Abadi's argument can be summarized in several points:

1. First, the sharia has been sustained and developed not in terms of theological-rational arguments, but the credibility of efficiency.
2. The second point is that society has deviated. There are interpretations of the Text, which are all interpretations by self-opinion and have no basis but illusions. In this way, Najm Abadi criticizes all new knowledge and their approach to religion. (Najm Abadi, 2011)
3. The third point is that his main issue is how to convert the Sharia into the law.

### **Mirza Malkam Khan's Effort to Preserve the Monarchy**

The logic of Malkam Khan's political thought (1249 AH - 1326 AH) is embedded in the discourse of Tanzimat. Because he believed despite all the distress of the Iranian estate, re-preserving the monarchy and implementing the reformations could just be undertaken by the king's hand.

Enough for the independent monarchs not to hinder the advancement of the nation, and we should without flattery been grateful to our king, with all the disadvantages of the arbitrary monarchy, who was still the best incentive for the progress of the state. We expect all kinds of orderliness from the king himself. We want the king to be both the regulator, the legislator, and the enforcer of the law. We are even waiting for the king himself organizes our House (Mirza Malkam Khan, 2002a).

Mirza Malkam , flattering about Nasser al-Din Shah, says Iran now needs adjustments. Adjustments that, because of Iran lucky, have been pioneered by the king himself and pushing his ministers toward it.

The state of Iran, undoubtedly, never has ever the better king than today.

It is a great blessing that, in a nation, the king is superior to all of his ministers not only based on the natural reason but also based on the confession of aliens. The western monarchs have generally denied the adjustments of their ministers, and today the king of Iran is forcing his ministers to make adjustments (Mirza Malkam Khan, 2002b).

Malkam Khan thought that Europe has two factories. One for Industry and the other for social-political order. In his opinion, the latter is more important than the former. Since the political order leads to the formation of the factory of industries. (Mirza Malkam Khan, 2002b) Nevertheless, intellectuals who have been in the west see only the first factory. He believed that if it could make the Islamic scholars (*Ulama*) understand the importance of political order, this matter would spread out and be accepted.

Malkam Khan stated that the progress and the improvement of western states are because of advancing in their bureaucracy (Mirza Malkam Khan, 2002b). The axis of the bureaucracy is the government. He distinguished the government between the monarchial dynasty and the republic. The way of governance in Western states is based on law: "From this historical verdict of Adam's descendants in all the civilized nations, it is definitively stipulated that the first basis of the world's development is the law which is said in the foreign countries the human and financial security" (Mirza Malkam Khan, 2002c).

He defines law as "any order issued by the government, that is based on the public interest of the clan and its obedience is a necessity equally for the clan's individuals, is called a "law" (Mirza Malkam Khan, 2002b). The powers of the government also include the enactment of the law and its enforcement. Based on this, Malkam Khan separates the monarchy into the two divisions of absolute and temperate.<sup>1</sup> In the absolute monarchy, both the power of legislation and the enforcement is in the king's hand like the Ottoman and

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1. There is a need to be said that Melkum Khan uses the "absolutist monarchy" phrase instead of "arbitrary monarchy". Whilst, in the Qajar political literature particularly in the Nasser period the use of the arbitrary monarchy phrase was more common. Perhaps Melkum Khan thought the absolutist state of Europe is equivalent to the Iranian arbitrary monarchy and therefore used the same expression in order to explain the Iranian arbitrary monarchy.

Russia. However, if the enforcement been in the king's hand and the legislation in the nation's, like England and France, it will call the temperate monarchy (Mirza Malkam Khan, 2002b).

According to Malkam Khan, discipline and progressiveness depend on the separation of these governmental powers. This is the secret of the progress of the temperate monarchs. However, he does not appropriate this governmental method for Iran and believes that it should imitate Russia and Ottoman. The absolute monarchs are divided into two regulated and unregulated types. Although in absolute regulated monarchs such as Russia and Austria and Ottoman the king has both the powers of the state in full control, he never mixes these powers in order to maintain state order and to preserve his personal power. It will never be possible for Russian and Austrian kings to empower their ministers to both to legislate the law and to enforce it (Mirza Malkam Khan, 2002b). However, in the unregulated absolute monarchies, these two powers are mixed and used. So he recommends that the regulated absolute monarch be template and the bureaucracy of government should divide into two separate parts, one the enforcement apparatus and the other regulating apparatus. "The determination of the will of the kingdom and the conditions for its implementation are the responsibility of the apparatus, and the execution of the will is under the conditions laid down in the apparatus (Mirza Malkam Khan, 2002b, p. 33)." Adjustments are the source of states discipline, and Iran's state rescue depends on the adjustment apparatus (Mirza Malkam Khan, 2002b).

From the utterances of Malkam Khan infers that between the intellectual elites of the Tanzimat period, several methods of governmentality and writing law have been considered as a template. Some found the English writing law method, which is based on the common law, appropriate for Iran's Sharia conditions due to confronting with East India Company. Some were in pursue of French codified writing law, and some others had accepted absolute Russian monarchy and put Ottoman in the same category.



### **Mustashar al-Dawlah and the Duality Issue of Law and Sharia**

Mirza Yusuf Khan Tabrizi, known as Mustashar al-Dawlah (1239 AH - 1313 AH), pursues the idea of law in his book "A Treatise on One Word" (1287 AH). The work was written during his years in France and was published in Iran after his return. This book has three main parts: an introduction, nineteen codes, and finally, a double ending. The Introduction of the book is very important and influential.

A look at Mustashar al-Dawlah's treatise on One Word reveals that his problem is no longer proving the existence of crisis and disorder. He assumes the disorderliness. The problem is the secret of the disorder. This is a discussion followed in the introduction of the treatise. In his view, the basis of the West is one word, and all progress comes from that. The government's intellectuals and elites have identified the West with its machine-made industries and not understood its origin. While these are results, not preparations:

The residents of your estate are far away from the basic issue. I asked how? The friend answered that some of you thought the discipline and the progressiveness of West are indefinite accessories, and some imagine because of sciences and industries, such as telegraphs, ships, steam, engines, and war while these are the results, not preparations (Mustashar al-Dawlah, 2003).

Mustashar al-Dawlah sees the issue as neglecting the word of law in order to develop civilization in Iran; thus, the codes of Islam agents become inefficient. The one word is the book of the "law."

That friend said: one word that all the regulations of West are inserted in is the book of the law in which utter common conditions and settings that belong to the worldliness are hidden in that, and the state and the community together are the guarantors to its permanence. As nobody of France or England or Austria or Prussia is in full control... the king and the poor and the peasant and the military man are enchained in its provision, and nobody has the power to disobey the book of the law (Mustashar al-Dawlah, 2003).

As a matter of fact, the strategic idea of Mustashar al-Dawlah is that should think of changing the state instead of economic progress. Hitherto it could be said the Mustashar al-Dawlah literature is going on the literature of Majd al-Molk, Najm Abadi, and Malkam Khan. However, in continuation, he makes a distance from previous discourse and mentions the differences between the French law and the Islamic Sharia. He points out nineteen codes in another of his treatise. However, the distinction between the French law and the Islamic Sharia is explainable in five basic issues (Mustashar al-Dawlah, 2003):

1. First, the code is written by acceptance of the nation and the state not just by the single vote. This shows that Mustashar al-Dawlah figures out the difference between the source of enactment of positive law and Nomos. Nomos is enacted by the philosopher and the Sharia, which is emanated from the divine revelation.
2. The French code includes all the ordinary laws thoroughly, and expurgates and devoids from ordinary, weak, and discrepancy opinions. Yet, the books of Islamic *Fiqh* include weak words and have all the opinions, so recognizing the weak opinion from the firm one is trouble.
3. The French code is written in a common language and could understand its notions easily and does not need a description or annotations. That the Quran was said to be a transpicuous eloquence because the book of the law should avoids abstruse words and be written in a common language and understandable of this time.
4. The fourth difference, which is the major and the most important, is that the code merely includes the worldliness expediencies, as it is useful for everyone from each tribe and religion. Nevertheless, in the Muslim book of Sharia the Muslim expediencies mix and merge with otherworldly expediencies, and hence, it does not look beneficial for the public policy (Muslims and non-Muslims). Because non-Muslim nations (the other religions) will not have the enthusiasm to read your book and will not exercise it. But in the worldliness matters, the decrees are equal.
5. As the fifth different, the code includes the customary and traditional

laws as well. However, for Muslims, all issues that belong to the tradition and the custom are preserved in the chests, not in the book. As far as these traditions and customs are not regulated, the occurrence of many injustices could be imagined in the name of tradition and customs, while the prehension principles of Muslims do not correspond with the Sharia of Islam prophet. As it comes in the *hadith* "what is good in tradition is like conditioned in Sharia," so chaining the traditional laws is an obligation as well.

In Mustashar al-Dawlah's view, backwardness needs law. The law cannot deduce from the custom; because the custom is got aberrant and disarranged. On the other hand, he rather than disputing on which the Sharia is mixed as well and should seek the "pure Sharia, " concentrates on how to writing law based on the pure Sharia. While in the Sheikh Hadi Najm Abadi thought, the problem is to prove the existent Sharia differ from the Mohammadian pure Sharia, and should be trimming. Hence, Mustashar al-Dawlah in A Treatise on One Word endeavors to correspond the nineteen principles of French human rights with the Quran verses and the narrations (*hadith*) and reveals the adaptability between them to finds out at the end all causes of progressiveness and civilization from Quran, authentic narrations, and the argumentative foundations in order to "not to be said anymore that whatnot is opposite to Islam or Islam inhibits the progressiveness and civilization (Mustashar al-Dawlah, 2003)." He sees equality between the "enjoining the right/honorable and forbidding the wrong/dishonorable" (*Amr bi al-Ma'ruf wa-Nahy an al-Munkar*) and freedom and between the parliament and council (*Shora*).

The importance of Mustashar al-Dawlah's "One Word" is not for the formulation of the positive law, but for the fact that he has realized that in order to regulate the disordered affairs of the estate, a basis must be found for the formulation of customary laws from the general principles. He is in pursuit of transforming the "book of Sharia" to the "book of law." His job is not formulating the positive law, but he is going to formulate a theory in the philosophy of law. Influenced by French ideas and the constitution of

Napoleon's era, he sought to reconcile the French legislative codes with the Sharia book and create new customary laws for the Iranians through inferring in Sharia religious principles, verses, and narrations. He does not, therefore, recommend establishing a Tanzimat House; he realizes that the French constitution is based on the will and consent of the "nation" and nothing but through the consent of the "nation" become the law. In the logic of the new political thought, the will of the nation is subordinate to the sovereignty of the people. He has therefore entered a new concept of parliament and representation as to the "Court of People's Representatives, " in which every "case ... has been considered" and "has been debated and dialogued about the right and the wrong," into Iranian political literature and laid the basis for new legislation (Tabatabaei, 2011). Mustashar al-Dawlah sought the unity of Sharia and customary law and considered the two to be the same. Criticizing the imitation of other states, he aimed at "explaining the common principles between Sharia law and customary law... in order to infer specific laws from their general principles (Tabatabaei, 2011, p. 110)."

Basically, the dominant spirit in the Tanzimat literature is that they believe that what has contributed to the progress of the West and reached the supremacy is the compliance with the law. The content and basis of this law, of course, existed more fully in Islamic Sharia and religion and used by Muslims. Only when they have forgotten and no longer does so have, they witnessed their impotence. The belief of the Islamic root of the idea of "law" has been continued during the founding of the national constitutional state in the literature of the supporters and opponents of the constitutional system with different arguments.

### **The Transformation of the Arbitrary Monarchy Apparatuses to the Regulated Monarchy**

One of the best documents to understand the governmentality during the period of the "regulated monarchy" is the reference to the text of the Third Nasserian Constitution (1275 AH). Instructions on the Order of State Affairs

and the Important Matters of the Estate, the Bill of the Supreme Court, the Bill of the Council of the Court and the Council of Ministers in Charge are the names used in Qajar sources for what is now known as the First and Second Nasserian constitutions (Adamiyat, 1356). After converting twelve ministries to fifteen ministries, the third text of the Nasserian Constitution was published (Zargarinejad, 2003).

Examining the text of this law properly manifests some points about the way of governing in the regulated monarchy. Although Article I of this law explicitly introduces the political structure of Iran as an "arbitrary-mighty monarchy," the examination of the content of the decree and the development of its apparatuses indicates the formation of the "regulated monarchy." According to the text of the decree, monarchy and sharia are two pillars of society from which the structure of the former is heirship. In this decree, however, the state is subject to the rule of law, the law itself is subject to the king's rule. The king delegates this power to both the Council of State and the Expediency Council, and of course, he chairs both (Zargarinejad, 2003). The interesting thing is that the notion of law is eternal, not something that needs to be amended on time. It is clear from the content of the definition of law that the idea of the development of the law has not been formed in its modern sense, what has been codified as the law is the same as the former his majestic commands orally stated and only already written and clarified. It should not be mistaken that the basis of the democracy has been taken into account due to mentioning the voting system in the wording of the majority, although the initial veins of equality of all subjects of the estate against the law, which of course excluded the king, can be seen. The decree clearly shows the absolute superiority of the king's position and authority even over the implementation of the Sharia (Zargarinejad, 2003).

In formulating the limits and duties of the Council of Ministers, many of them are in line with the regulations. The role of the Minister is advisory and has been announced explicitly (Zargarinejad, 2003). Their task is first and foremost to preserve the monarchy and its bounds. The king's domination and his chairmanship over the House of Law have been the base of Sharia

law. Parliament is obliged to obey the king's orders even in the legislative process (Article 1) (ZargariNejad, 2003). Although there has been an attempt to establish a Ministry of Justice, the duties of the Ministry of Justice are only to oversee the State Council, not the King. Article 21 even revokes the right to a hearing (ZargariNejad, 2003).

Another interesting point is that inequality has been permeated in the text of the law. The decree has been obliged to the Interior Ministry to tolerate and apply the political and religious elite demands. In Article 18, the duties of the Ministry of the Interior have been conferred with special privileges for the noble princes and supreme scholars, although it has placed the group under the law (Zargarinejad, 2003). The Ministry of Foreign Affairs has been given the task of taking care of the rights of religious minorities (Zargarinejad, 2003). The description of the duties and powers of the Ministry of Justice has shown in an utmost brief (Zargarinejad, 2003). This period in Iran historically persists until 1324 AH. However, in terms of the state of thought, the turning point in 1309 AH coincides with the tobacco movement. The tobacco movement as a socio-political event is a turning point in the revolution of the history of Iranian political thought.

### **Conclusion**

The question of the law and writing law is a new idea adopted from the ideas of the modern epoch of western civilization and the formation of the modern state in those lands. According to Franz Neumann, there were two conceptions of law in European lands. A group with a political approach emphasized the form of law that introduced "decisionist theory." In this theory, the definition of law was based on the source of the law, i.e., who makes the law? parliament, church, king, or government? This theory held that the law was valid due to the origin of the forgeries. Accordingly, what is discussed about the law is the issue of the "will/voluntas" and voluntarism. Because any political decision of sovereign, regardless of its material contents, is considered the law (Neumann, 1957).

The second idea emphasizes the authenticity of the law content as

opposes to voluntarism. Therefore, what matters is not the source of the law, but the "rational principle" behind the law. According to this theory, the law can be issued by the sovereign, but not due to the sovereign power. Rather, the validity of the law is separated from the will of the sovereign and is based on principles of ethical values (such as the principle of equality). The result of this theory is that even if the sovereign ignores some of the ethical principles of that system, the legitimacy of the law and its validity will still be protected (Neumann, 1957).

It sounds like, in the Tanzimat period of Iran, the idea of law was formulated based on the content of the law. There were discussions and debates on the explanation, justification, and interpretation of the law. All the utterances were about; which law is the right law? What is the proper criterion to pass a rightful regulation? Must the law be written based on nature, the tradition, the practices, the custom or the divine Sharia?

Simultaneous with the change of the problem in Europe, the Iranian understanding was changed as well. In Europe, the idea of law was bonded with national sovereignty. Likewise, in the threshold of Constitutionalism, it had been seen that all the books of the Constitutionalism epoch emphasized the classification of world states, political systems, and fundamental rights. Both the supporters and opponents of the Constitutionalism had such debates in their books. This is because everyone was in pursuit of a criterion to condition the sovereign to the will of the law.

Based on the rational theory, the state is obliged to secure the rights of its subjects. The law, thus, becomes converting the rights of right holders to the law. Speaks are about the accuracy and inaccuracy of the criterion and the law. However, in the theory of voluntarism, since the will of the nation is the criterion to emanate the law and national sovereignty, the question of the right or wrong of the law is no longer raised. The law here is a kind of creation (*Insha*). In creation, there is no right or wrong. Instead, it is a question of efficiency. It seems that in the Constitutionalism era, the idea of voluntarism is the basis for the thought of lawmaking.

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