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Divine vs. Human Law: The Quarrel between the Anti- and Pro-Constitutionalist Jurists in Iranian Constitutional Revolution of 1906

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Abstract: This study investigated the quarrel between the pro- and anti-constitutionalist jurists following the establishment of the first National Consultative Assembly (Majlis) in Iran and the drafting of the first constitution in 1906. A group of *shi'ite* jurists launched an attack on Majlis, in addition to the ideas of human legislation, freedom, and equality, by considering the Islamic *Shari'a* law to be a set of perfect and impeccable laws. In response to these oppositions, the pro-constitutionalist jurists argued in favor of the constitutional movement. In this paper, it is argued that the quarrel could be considered as evidence for the perennial tension between the divine and human law in Islam. It appears that examining this conflict may shed light on incidents shaping the history of contemporary Iran.

Keywords: constitutionalism; constitution; parliament; Islamic *Shari'a* law; human law; freedom; equality; Iran



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1. Introduction

In Iran, the nineteenth century, which coincided with the reign of the Qajar dynasty, was a period of profound changes in the economy, politics, and culture. As Abbas Amanat explained, “gradual awareness of, yet ambivalence toward, the West’s pervasive ways was at the heart of the Qajar experience.” (Amanat 1997, p. 1) The seeds of constitutional thought in Iran were also sown in the early nineteenth century when a group of intellectuals introduced modern concepts and ideas—such as the rule of law, limited monarchy, freedom, and equality—to the country.¹ The main objective of the constitutional movement was to curtail the Shah’s absolute power by making a set of laws modeled after European ones—that is, a state based on rule of law. This was not something that could be easily accomplished for two reasons: First, the Shah opposed any limitations on his absolute power. The Qajar shahs, like their predecessors, were considered “the locus of divine glory and possessor of royal charisma.” They were also considered the “shadow of God on earth”. (Amanat 1997, p. 9) According to this image, the law was nothing more than the will of the king. Consequently, any discussion of law or constitution(s) was considered contrary to the boundless will of the king. Second, the *Shi'ite* clerics considered the idea of law making to be contrary to Islam. In defense of their claims, the *Shi'ite* clerics put forward two main arguments: First, *Shari'a* is so complete and so perfect that it renders new laws unnecessary; second, the crafting of legislation is specific to God, His Prophet, and the infallible Imams.

However, what made the situation worse for the constitutionalists was the collaboration between the shahs and the *Shi'ite* clerics, which had its roots in the Safavid period (1736–1501) and reached its peak during the Qajar period. Just as the shahs needed the ‘*ulamā*’ to strengthen their political legitimacy, the ‘*ulamā*’ also needed the shahs’ support to enhance their social base. Although this collaboration hindered the constitutional movement in Iran, the National Consultative Assembly, known as the Majlis, was eventually established in 1906, and the first constitution was drafted. However, the conflict between

divine and human law remained a major problem. It is important to point out that the anti-constitutional jurists did not criticize the “constitution” as long as it was understood as not contradicting the laws of *Shari‘a*. Most jurists even believed that the ruling power should be limited in order to promote justice and eliminate oppression. Their main opposition, however, was to the ideals of “constitutionalism”, namely, freedom and equality, which they perceived as incompatible with Islamic teachings.²

Because it was written very hastily, the first constitution failed to comprehensively consider the rights of the nation. One year later, Majlis deputies made up for this shortcoming by drafting the Supplementary Fundamental Laws. In the Supplement, for the first time, a chapter was devoted to the rights of the nation. Legal debates over the fundamental rights of Iranian subjects indicated a gradual transition from their traditional *ra‘iyyat* (liegemen) to *citizen*, on the one hand, and the Islamic *umma* to *milla* (nation), on the other. New sets of laws, according to Janet Afary, “were promulgated in the hopes of creating a nation-state with equal rights for all male citizens.” (Afary 2013) Besides, with this transition, the newly formed citizens gained a chance to participate in politics. However, this issue exacerbated the anti-constitutionalist clerics’ opposition. Among the most controversial concepts that intensified the opposition were freedom and equality, which were proclaimed as fundamental rights of the nation. According to the opponents, there was no room for such concepts as freedom and equality in Islam. In terms of freedom, they believed that the relationship between God and humans in Islam was based on ‘*ubūdiyyat*’ (devotion) and this relationship denied any freedom, which they tended to consider as arbitrariness or whim seeking. They also argued that equality had no significant meaning in Islam, because by accepting the principle of equality, a Muslim would be treated equally to a non-Muslim living in an Islamic community, which is clearly in conflict with Islamic laws. As a result, the opponents held that the two concepts could undermine the foundation of divine law and disrupt the existing social order.

As opposition to constitutionalism increased, secular intellectuals, knowing that they were theoretically incapable of combating the opponents, decided to persuade another group of high-ranking ‘*ulamā*’, who were in favor of constitutionalism and equipped with similar conceptual tools, to join the debate. The quarrel between the two groups of ‘*ulamā*’ was one of the most important turning points in the history of Iranian constitutionalism, and has not been adequately studied. In the last decades, few studies have addressed the role of Islamic jurists in the constitutional movement (Algar 1969; Hā‘irī 1977; Bayat 1991; Afary 1996; Arjomand 2012; Farzaneh 2015). However, the existing scholarship has provided merely a historical account of the quarrel between the pro- and anti-constitutionalist jurists, rather than examining judicial arguments put forth by both sides. These studies can, therefore, be classified as either social history or political sociology, which generally pay little attention to conceptual history. On the contrary, the present article aims to examine the main treatises of these two groups, highlights their main arguments according to their jurisprudential principles, and thus provides an example of the historiography of ideas.

2. The Victory of the Movement

The rapidly deteriorating economic situation and escalating protests in early twentieth-century Iran (Sharīf Kāshānī [1363] 1984, pp. 21–22) forced Muẓaffarī‘d-Dīn Shāh Qājār (1853–1907) to issue a decree in January 1906, establishing the ‘*Adālat‘khānah*’ (the House of Justice),³ the main demand of the protesters (Kasravī [1940] 1984, pp. 71–72). Immediately after, a commission was formed to enact some necessary rules and laws for this institution (‘*Alāmīr* [1987] 1988, p. 521). However, as disputes among the members of the commission escalated, the project faced a stalemate, which could be due to the fact that some commission members decided to enact the laws in line with European laws, whereas other members preferred to highlight the fundamental conflict between the European laws and *Shari‘a* (‘*Alāmīr* [1987] 1988, pp. 521–22)⁴. The failure to establish the house of justice sparked a new wave of protests and led to a large demonstration in Tehran. The killing of several people in demonstration provoked a strong reaction from merchants, ‘*ulamā*’, and other

political groups against the government (Safā'ī [1355] 1976, pp. 31–33; Sharīf Kāshānī [1363] 1984, pp. 62–66). The next important step was taken a few days later with the sit-in of merchants at the British embassy (Sharīf Kāshānī [1363] 1984, p. 73). In this period, the demand for the establishment of the House of Justice was replaced with the demand for the establishment of the National Consultative Assembly (Abrahamian 1982, pp. 84–85). Muẓaffarī'd-Dīn Shāh eventually issued a decree establishing the National Consultative Assembly in August 1906 (Kasravī [1940] 1984, pp. 119–20).

Although the idea of the establishment of Majlis was finally approved and supported by the Shah, it faced a serious barrier from the beginning, because a group of the *Shi'ite* jurists, led by a high-ranking jurist Shaikh Faẓl-Allāh Nūrī (1843–1909), opposed constitutionalism by pointing out its fundamental contradiction with Islam. These oppositions prompted the pro-constitutionalist jurists to enter the battlefield. The theoretical struggle of the pro- and anti-constitutional jurists in that period enriched the debates on the legitimacy of constitutionalism and provided the ground for participation of the jurists in political affairs. In this paper, the quarrel between the pro- and anti-constitutionalist jurists after the victory of the constitutional movement is examined through this historical background, and its influence on the process of drafting the first constitution in Iran is investigated.

3. Anti-Constitutional Jurists against the Constitution

The first National Consultative Assembly was inaugurated on 6 October 1906. The parliament was also a Constituent Assembly, because its first term was dedicated to drafting the constitution and its Supplementary. The constitution, which had no more than 51 articles, was drafted in a short time and signed by Muẓaffarī'd-Dīn Shāh on 30 December 1906. A few days later, the Shah died and his son Muḥammad 'Alī Mīrzā (1872–1925) came to the throne. To restore the weakened authority of the monarchy, the young king undermined the newly established Majlis and the new political order from the very beginning of his reign. It was from this time that the Shah and the anti-constitutional jurists formed a kind of coalition against constitutionalism. Muḥammad 'Alī Shāh's refusal to invite parliament members to the coronation ceremony was the first sign of his anti-constitutional policy (Kasravī [1940] 1984, p. 201; Kirmānī [1967] 2000, pp. 65–66; Bashīrī [1983] 1984, p. 20). In addition, he prevented his ministers from going to Majlis because he intended to demonstrate that his father's constitutional decree was a decree to establish *Dār al-Shaurā* (The Council House) to consult on the affairs of the country, not legislation in its proper sense. However, this interpretation of the constitutional decree provoked widespread protests from Majlis deputies, and finally forced him to retreat. Accordingly, he issued a decree to support the constitutional state and the constitution on 11 February 1907 (Hidāyat [1363] 1984, p. 38). Nevertheless, it did not spell an end to the Shah's hostility toward parliament and constitutionalism. In this article, it is noted that he sought to weaken the parliament at every opportunity.

It should be noted that the 1906 constitution was ambiguous and lacked many details, particularly the rights of the nation. The Supplementary Fundamental Laws of 1907 were drafted to complete the constitution. It was the first time that the rights of the nation were recognized by the law, which marked a crucial transition from the ancient concept of liegemen (*ra'iyyat*) to the modern concept of citizenship.

Within the Western political tradition, citizenship has traditionally been regarded as holding a formal status as a member of a political and legal entity, and having rights and obligations within it (Bellamy 2014, p. 2). Therefore, it could be said that the modern concept of citizenship embraces three pillars: individual rights, belonging to a national community, and participating in its economy and politics (Bellamy 2004, pp. 6–7). Examining the chapter devoted to the rights of the nation in the Supplementary Fundamental Laws of 1907, one could argue that it contains all three basic components of modern citizenship. Freedom and equality were the two key concepts emphasized in the chapter. However, these emphases eventually gave rise to some opposition. As soon as the anti-constitutionalist jurists saw how the Majlis placed more weight on concepts such as

freedom and equality, they launched their fierce opposition against it (Afary 2013). The controversy began when the deputies passed a law stating that “In the matter of taxes there shall be no distinction or difference amongst the individuals who compose the nation” (Article. 97). According to this Article, *jizyah*, a poll tax paid by *dhimmī* (non-Muslim subjects),⁵ should be replaced by the tax in its modern sense, which was levied equally on all citizens. Among the first to express opposition to the Article was Shaikh Faḡl-Allāh Nūrī. He considered the Article to be contrary to the Islamic legal system because he argued that the Article, by eliminating the “distinction or difference amongst the individuals”, ultimately led to equality between Muslims and *dhimmī*. By and large, the controversial issues, such as freedom and equality, led the Nūrī and his supporters to put all their efforts into preventing the final ratification of the Supplement. Towards that end, they began to send telegrams to states and provinces, in addition to the religious cities such as Najaf and Karbalā, where the high-ranking mujtahids of the time lived. They intended to persuade the mujtahids into issuing a *fatwa* against the Majlis and the constitution. Nevertheless, their efforts proved futile as the mujtahids in Najaf and Karbalā had already demonstrated their support for the constitutional movement. Having failed to gain the support of the high-ranking mujtahids, they decided to compel the Majlis deputies to add some articles to the constitution and make changes to the wordings of the existing ones, which were considered contrary to *Shari’a* law. These fierce disputes led to the drafting of Article 2 of the Supplement, which gave the jurists the ability to intervene in the legislative process. The Article was formulated at the suggestion and insistence of Shaikh Faḡl-Allāh and finally added to the draft.

Shaikh and his associates, however, resumed their opposition, claiming that the promises made to them had not been fulfilled. They believed that the constitutionalists had manipulated Article 2 as it was not the same as its original version (Nūrī [1362] 1983, p. 267). According to this article, “it is for the learned doctors of theology (the ‘*ulamā*’) [. . .] to determine whether the laws proposed may be inappropriate or not to the rules of Islam”. Although this could have satisfied the opponents, the dispute escalated when the representatives set a condition for the committee composed of ‘*ulamā*’: it was decided that “the ‘*ulamā*’ and Proofs of Islam shall present to the National Consultative Assembly the names of twenty of the ‘*ulamā*’ [. . .] and the Members of the National Consultative Assembly shall, either by unanimous acclamation or by vote, designate five or more of these according to the exigencies of the time, and recognize these as Members”, who had the authority to “reject and repudiate, wholly or in part, any such proposal which is at variance with the Sacred Laws of Islam so that it shall not obtain the title of legality.” Nevertheless, Shaikh Faḡl-Allāh continued to oppose because he maintained that the Majlis had no right to interfere with the appointment of the committee as the right to elect and appoint the members rested solely with ‘*ulamā*’ (Nūrī [1362] 1983, p. 268). On the other hand, pro-constitutionalists claimed that the Shaikh’s and his associates’ demands were fully implemented in both the Constitution and the Supplement and that the Constitution had no conflict with the sacred laws of Islam.

However, the opponents, who believed that their demands had not been met, decided to leave Tehran, and stage a sit-in at the Shāh ‘Abdul-‘Azīm Shrine⁶ on 21 June 1907. An important event that happened at the time was the publication of a newspaper called *Lavāyeḡ* (the Bills), which promoted the thoughts and demands of the sit-in opponents. Shaikh Faḡl-Allāh, who led the protest movement, was the main author of these leaflets. By publishing this newspaper, the opponents aimed to show that they never opposed constitutionalism, but only wanted to amend the constitution following *Shari’a* law (Nūrī [1362] 1983, p. 233). Even in an announcement on 29 July 1907, they swore that the goal of the sit-ins was never to undermine the constitutional order (Nūrī [1362] 1983, p. 269). It should be noted that the anti-constitutional jurists were opposed to constitutionalism from the very beginning of the movement. However, they adopted the strategy of *taqiyya* (dissimulation) and tolerance because the basis for expressing their true beliefs was not yet established (Zargarī-nizhād [1390] 2011, p. 47). Interestingly, whenever they found Muḡammad ‘Alī

Shāh in a strong position against Majlis, or when they found the constitutionalists in a vulnerable situation, they intensified their attacks and introduced Majlis as a center where “atheists and libertarians” come together and “encourage women to wear men’s clothes and children to go to school” and promote immorality and prostitution in general (Nūrī [1362] 1983, pp. 285–89).

Another issue that exacerbated the situation was the Shah’s unwillingness to sign the Supplementary (Ādamīyat [1387] 2008, p. 33). However, this situation changed in favor of the constitutionalists when the Prime Minister Amīn al-Sulṭān (1858–1907) was assassinated in front of the parliament on August 31, 1907 (Hidāyat [1363] 1984, p. 52; Bashīrī [1983] 1984, pp. 68–69; Malikzāda [1949] 1984, pp. 470–72). The Prime Minister was accused of providing financial support for the opponents of constitutionalism. The assassination of Amīn al-Sulṭān terrified the Shah and the courtiers (Kasravī [1940] 1984, p. 451), especially when it was reported that people in Tehran and other cities were praising the assassin of the Prime Minister. As the opponents realized that the Shah would finally sign the Supplementary, they tried to be moderate and not to oppose the constitution and the parliament (Nūrī [1362] 1983, pp. 338–43). The next step was to terminate the sit-in at the Shāh ‘Abdul-‘Azīm Shrine on 16 September 1907.

Although the Shah signed the Supplementary and the sit-in ended, hostilities against constitutionalism did not end. An additional anti-constitutional program involved escalating insecurity, theft, murder, and looting in Tehran and other cities. Through these actions, the Shah and the courtiers sought to convince the people that constitutionalism was the major source of numerous crises (Daulat’ābādī [1328] 1949, pp. 157–60). In this chaotic situation, a group of extremist constitutionalists⁷ published articles in newspapers to explicitly criticize and even insult the Shah (Ādamīyat [1387] 2008, p. 110). However, the tension between the Shah and Majlis culminated when a group of extremists tried to assassinate the Shah on 28 February 1908 (Kasravī [1940] 1984, pp. 577–78). In response to these provocative actions, the Shah finally bombarded the Parliament with Russian support on 4 June 1908, and the period of *Istibdād-i Šaqīr* (the lesser despotism)⁸ began.⁹

4. The Lesser Despotism and the Escalation of the Anti-Constitutionalist Opposition

The lesser despotism, as an important incident in the history of constitutionalism in Iran, strengthened the anti-constitutionalists’ position and allowed them to be more explicit in their fight against the constitutional movement. A significant episode in the history of political thought in contemporary Iran was the intense debate between the pro- and anti-constitutional jurists during the lesser despotism, which was reflected in several treatises written for and against constitutionalism. In this section, we explore two treatises that contain the main arguments of the opponents of constitutionalism.

The first treatise published during this period was *Kashf al-Murād min al-Mashrūṭah va al-Istibdād* (Discovering What is Meant by Constitutionalism and Despotism) by Muḥammad Ḥussayn Tabrīzī, an anti-constitutional cleric. Although Tabrīzī wrote his treatise in early September 1907 by adopting the strategy of dissimulation and tolerance (Tabrīzī [1390] 2011, p. 189), he avoided publishing it because the power was concentrated in the hands of the constitutionalists. However, with the beginning of the lesser despotism and four months after closing the parliament, he found the context appropriate to publish his treatise (Zargarī’nizhād [1390] 2011, p. 175).

Tabrīzī begins his tract by criticizing the taxation system as a system contrary to *Sharī‘a* law, accusing the constitutionalists of making attempts to legitimize this illegal act (Tabrīzī [1390] 2011, p. 190). He then criticizes the constitutionalists as incapable of providing welfare for people, because not only did they not fulfill their promises, but they also made things worse (Tabrīzī [1390] 2011, pp. 191–92). In addition, he charges the pro-constitutional newspapers of insulting the government by abusing freedom of expression, thereby endangering the security of the country, and intensifying the chaos (Tabrīzī [1390] 2011, p. 194). However, in his view, the main *Fitnah* (affliction) is the quarrel that arose among the ‘*ulamā*’, i.e., those who are responsible for guiding the people and

preventing them from going astray (Tabrīzī [1390] 2011, p. 194). After expressing his critical approaches, Tabrīzī quotes a verse from the Qur'an¹⁰ and states that it was his religious duty that led him to enter the debates on constitutionalism to reveal the true nature of this movement (Tabrīzī [1390] 2011, p. 195). To accomplish his goal, he set out to criticize the main achievement of constitutionalism, viz., Majlis.

According to Tabrīzī, if the Consultive Assembly had functioned according to the *Sharī'a* law and promoted two important Islamic requisites, namely, *amr-i bi ma'rūf va nahy-i az munkar* (commanding right and forbidding wrong),¹¹ it would have been supported by the 'ulamā' (Tabrīzī [1390] 2011, p. 195). However, he believes that the existing Majlis is incapable of realizing the prementioned activities (Tabrīzī [1390] 2011, p. 197). Tabrīzī considers Majlis to be an institution which gives rise to injustice and paves the way for blasphemy because some laws ratified in this parliament support the *illegal* taxation system, consider the infidels equal with the Muslims, and acknowledge human freedom (Tabrīzī [1390] 2011, p. 198). In his view, the foundation of justice is belief in God and His worship, whereas the constitutionalists attempt to convince people to believe in patriotism, altruism, and parliamentarism (Tabrīzī [1390] 2011, pp. 200–1). Tabrīzī takes Islam as the most perfect religion and argues that its legal system, namely, *Sharī'a*, is so perfect that it includes detailed rules for any situation or case. Like many other anti-constitutionalist jurists of his time, he believes that this specific feature of Islam eliminates the need for legislation as performed in Majlis (Tabrīzī [1390] 2011, p. 204). In his opinion, the advocates of constitutionalism, or in his words “materialists” and “liberals” (Tabrīzī [1390] 2011, p. 211) who have been enchanted by the French legal system, consider Qur'an as an obsolete book and attempt to undermine the basis of *Sharī'a* (Tabrīzī [1390] 2011, p. 206).

In another part of his treatise, Tabrīzī discloses his tendency for the absolute monarchy ruled over by a mighty sultan. His argument is as follows: Needless to say, human beings are by nature vicious and tend to evil. A person who tends to commit crimes will be edified by either education or coercion. The former happens very rarely among people because it requires proper knowledge of God. Hence, there is no alternative but to choose the latter. However, it should be noted that edification through coercion requires a mighty and absolute sultan because his absolute power can create a feeling of fear, which can compel people to obey the law. Therefore, efforts should be made to strengthen the power and glory of the sultan. However, according to Tabrīzī, the existing Majlis seeks to weaken the Shah rather than to strengthen him, which provides the context for affliction and turmoil (Tabrīzī [1390] 2011, pp. 207–8).

As mentioned above, *Sharī'a* is regarded by Tabrīzī as so perfect that legislation is not required. In addition, he thinks that in cases where there is no specific verdict on an issue in *Sharī'a* or where *Sharī'a* is completely silent, it is necessary to refer to those who are experts in interpreting religious and legal matters independently, namely, 'ulamā'. To strengthen his position, Tabrīzī refers to a Hadith from the twelfth Imam of the *Shī'ites*, which was, in fact, a response to one of his companions who asked the question of “What is our duty regarding the incidents which will occur during your occultation?” The twelfth Imam responded: “In such incidents, you should refer to the narrators of our Hadith because they are the proof (*hujjat*) of me to you and I am the proof of God (*hujjat Allāh*) to them” (Tabrīzī [1390] 2011, p. 212).¹² In general, a jurist could be considered as *hujjat* only after meeting certain criteria, such as demonstrating his profound religious knowledge, having the fear of God, and doing justice. Only under these circumstances, his legal deductions could be categorized as law in cases where *Sharī'a* is silent. Relying on the doctrine of *hujjat*, Tabrīzī aims to demonstrate that the existing National Consultative Assembly is illegitimate and illegal because the legislation based on a “majority vote” could not be considered as *hujjat* (the proof) and is contrary to *Sharī'a*. According to Tabrīzī, legislation could be considered as a necessary process only among materialists, Christians, and pagans, because none of them has a holy book including a comprehensive set of law covering *hudūd* (limits sanctioned by God), *sīyāsāt* (political affairs), *mavārīs* (inheritances), and *mu'āmalāt* (human relations).

Although, as an exception, the Gospel could be regarded as a holy book, it should be noted that it is mostly dedicated to moral, rather than worldly, affairs (Tabrizi [1390] 2011, p. 213).

By distinguishing between *fāsiq* (sinner) and *kāfir* (infidel), Tabrizi, in another part of his treatise, argues that when a political regime tends to *istibdād* (despotism), one should consider this kind of *istibdād* as *fiṣq* (sinfulness) not *kufr* (blasphemy), and the sultan as *fāsiq* not *kāfir*. Provoking this controversial debate, he seeks to conclude that the constitutional movement is an example of *kufr* (blasphemy), and the advocate of constitutionalism is an example of *kāfir* (infidel). According to Tabrizi, a despot or unjust king by no means denies the laws of *Sharī'a*. In fact, all he does is to disobey the holy rules. Thus, he should be regarded as a sinner. However, the constitutionalists should be considered as infidels because they intend to enact a set of laws, such as paying taxes or customs duties, that are contrary to *Sharī'a*. Tabrizi concludes that forcing people to obey the laws that are against *Sharī'a* is an example of blasphemy (Tabrizi [1390] 2011, pp. 216–17).

After harshly criticizing constitutionalism and excommunicating the constitutionalists, Tabrizi formulates his ideal *Sharī'a*-permissible regime (*mashrū'ah*). He asserts that Muslims have the laws of *Sharī'a* that make the legislative power unnecessary. The administrative power, which consists of the Shah and his functionaries, is the only required institution. Nevertheless, the main problem, according to Tabrizi, is the wide gap between theory and practice. In other words, he believes that although the people of the country pretend to be submitted to *Sharī'a*, they commonly tend to behave against Islamic law. The only thing required under such circumstances is a Majlis whose main purpose is to monitor the people's conduct. It is nothing but the Islamic commanding right and forbidding wrong (Tabrizi [1390] 2011, p. 220).

We now turn to the second treatise, *Ḥurmat-i Mashrū'eh* (On the Sanctity of Constitutionalism) written by Shaikh Fazl-Allāh Nūrī. In his treatise, Nūrī relies on his profound knowledge in the field of Islamic jurisprudence, criticizes the foundations of the constitutional thought, and defends his ideal regime, i.e., *mashrū'ah* (*Sharī'a*-permissible regime). In the opening pages of his treatise, Shaikh confesses that when he heard that the constitutionalists were seeking justice, he accompanied them and saw that their actions deserved support. However, over time, he realized that the main objective of the movement changed, and the constitutionalists began to talk about electing representatives and trusting the “majority vote”. Shaikh states that he first thought that changes could pave the way for expanding the ideal of justice. Therefore, he preferred not to dissent. Nevertheless, it gradually became clear that the constitutionalists were pursuing to draft a constitution. He concluded that the constitutional movement was nothing but a heresy with a potential to damage Islam and mislead people (Nūrī [1908] 2011, pp. 259–60). Then, Shaikh revealed his opposition to constitutionalism.

The idea of representation, which Shaikh considered as equal to the concept of *vikālat* (attorneyship) in *Shi'ite* jurisprudence, alongside the drafting of the law, had no place in Shaikh's jurisprudential teachings. According to him, *vikālat* is a category defined in the field of “private law” and has nothing to do with “public affairs”. Therefore, he raises the question that if *vikālat* included the public affairs, there would be no need for the religious institution. However, if the “goal is the public religious affairs”, it is defined in the field of *vilāyat* (the guardianship), which “due to occultation of the Imam, is the responsibility of the *Shi'ite* jurists and mujtahids, not ordinary people” (Nūrī [1908] 2011, p. 260). Taking *Sharī'a* law into account, Shaikh asserted that it was not permissible to draft the laws in Islam by referring to the “majority vote” because “our law as Muslims is Islam, and Muslims do not require a new law at any time” (Nūrī [1908] 2011, p. 260). The dispute between Shaikh and the constitutionalists escalated when he made the approval of the constitution conditional on its compliance with *Sharī'a*. However, his opponents believed that the constitution could not conform to divine and Islamic law because, if the constitution complied with *Sharī'a*, foreign governments would not recognize Iran as a constitutional state (Nūrī [1908] 2011, p. 261).

Shaikh points to some of the constitutional discrepancies with the basic principles of Islam using his jurisprudential understanding of human law. It should be noted that “equality before the law” is a controversial issue, and was discussed among the advocates of constitutionalism and caused some ambiguity in the constitution of 1906 because it remained unresolved. For instance, Article Eight of the Supplementary states that “The people of the Persian Empire are to enjoy equal rights before the *state* Law” [emphasis added]. Of course, we know that in the draft of the Supplement, this article was as follows: “The people of the Persian Empire are to enjoy equal rights before the Law.” The “Law” was changed to the “*state* Law” due to the opposition of the ‘*ulamā*’ so that the people of the Persian Empire would remain unequal before *Sharī’a* law. Based on this article, the people are still unequal before *Sharī’a*, which resulted from the nature of the Islamic legal system according to which men and women have no equal rights in inheritance, blood money (*wergild*), and testimony. Additionally, in an Islamic community, the followers of other religions are not equal to Muslims although they enjoy religious freedom (if limited). It appears that this article has led to two different citizenships for Iranians: (a) heavenly citizenship (a kingdom ruled by the divine law) and (b) earthly citizenship (a kingdom ruled by the human law). This division shows the fundamental conflict between the modern concept of citizenship and the traditional concept of *ummah* or Islamic community. It appears that the transition from the latter, which was based on inequality, to the former, which was based on human’s unconditional and absolute natural rights, faced major barriers. We may be able to better understand these barriers by examining one of the major components of modern citizenship, namely, the modern theory of natural rights.

According to Michelle [Villey \(1975\)](#) and Francis [Oakley \(2005\)](#), the origins of modern natural rights theory can be traced back to developments that began with the new nominalist philosophical perspective. Among the nominalist philosophers, William of Ockham is considered to be the founder of modern natural rights theory, the one who articulated the first account of subjective rights as the unique properties of each individual human being ([Saccanti 2016](#), p. 21). Villey explains that the Franciscan master used the term *ius* to refer to the individual power of human beings, which became the basis for the modern definition of right ([Saccanti 2016](#), p. 18). It was this notion of power that was tied to the modern concept of free will and paved the way for the emergence of a new definition of man; namely, the “modern subject”. One of the most important features of political modernity and modern citizenship is recognizing the modern subject as an individual possessing unconditional natural rights, such as freedom and equality. It was a form of humanism that, according to Michael Gillespie, granted “quasi-divine status to human beings.” ([Gillespie 2008](#), p. 292) In contrast, according to the teachings of Islamic traditionalists, who considered God to be omnipotent, humanism was nothing more than a rebellion against God. Thus, it could be argued that the most important obstacle to political modernity in Iran was the lack of this perception of human beings and their natural rights in the eyes of the anti-constitutionalist ‘*ulamā*’. The two concepts of freedom and equality provoked the most opposition.

Regarding the importance of legal equality, a representative told Nūrī that “If all the articles of the constitution are changed but the principle of *musāwāt* (equality) remains, the foreign governments will recognize us as a constitutional state, but if we have all the articles except the principle of equality, they will not recognize us as a constitutional government.” Shaikh writes in response: “You should know that the Islamic government will not be constitutionalized because equality is impossible in Islam!” To justify his claim, he refers to a set of Islamic laws, especially in the field of ‘*ibādāt*’ (religious observances), *sīyāsāt* (political affairs), and *mu‘āmilāt* (human relations), which have been enacted according to the principle of “inequality”. According to Shaikh, even the emphasis on the “state law” could not solve this dilemma, because if the state law is per the *Sharī’a* law, then it cannot assume equality, and if it is contrary to Islam, the constitution will be in contradiction with itself. Shaikh addresses the pro-constitutionalists and bluntly writes: “O ignoble! Shame on you! Look! the founder of *Sharī’a* has honored you because you are Muslims and has

given you privileges, and you are depriving yourself of privileges and saying that I must be equal to the Zarathustrians, Christians, and Jews" (Nūrī [1908] 2011, pp. 265–67).¹³

It should be noted that Shaikh Faḡl-Allāh's objection to the legitimacy of the legislation stems from his religious-political thought. According to his jurisprudential doctrines, he believes that prophecy and kingship were concentrated in the hands of the Prophet of Islam, and they were passed on to his righteous successors (in this case, *Shi'ite* Imams). However, due to the occultation of the twelfth Imam, a split emerged between prophecy and kingship. Under such circumstances, the Prophet's religious *vilāya* (authority) passed on to the Islamic jurists, whereas his political *vilāya* passed on to the Muslim sultan who was the guardian and the executor of *Sharī'a*.¹⁴ According to Shaikh, the realization of *justice* in the Islamic community is possible only when the Shah is completely willing to implement *Sharī'a*. That is why Shaikh believes that the weakening of the monarchy inevitably leads to the decline of *Sharī'a*. Therefore, the constitutional movement for Shaikh was nothing but a movement to undermine the sovereign power, which could result in *Fitnah* (affliction). However, because the defense of *Sharī'a* appears as a religious duty during the time of affliction, Shaikh had no choice but to cooperate with and support the Shah. Expressing the consequences of undermining the authority of the Muslim sultan, he refutes the constitutionalists' claim that the constitutional state can strengthen Islam and expansion of justice (Nūrī [1908] 2011, pp. 269–72).

It is noteworthy that the establishment of a new judiciary system was one of the main objectives of the constitutionalists in Iran. They were aware of the fact that it was necessary to pass a coherent set of laws related to the needs and requirements of the age in order to achieve this goal. Although Iranian legislators referred to the laws of European countries (e.g., France and Belgium) to draft the first Iranian civil law,¹⁵ they knew that Islamic jurisprudence could also serve as a rich source. Thus, the opposition of the anti-constitutional clerics diminished as long as Islamic jurisprudence was considered as a source for drafting civil law (Ṭabāṭabā'i [2006] 2013, p. 416). However, the discussions about the idea of reforming trial procedures for adapting them with modern criminal law intensified the opposition. For instance, Article 12 of the Supplementary precisely stated that: "No punishment can be decreed or executed save in conformity with the Law." Taking this article into account, Nūrī asserted that the implementation of *Hudūd* (the prescribed punishments)¹⁶ in Islam was fixed by God and did not need to be approved by the customary-secular law. In addition, during the occultation, the *Shi'ite* jurists had total authority to implement the prescribed punishments (Nūrī [1908] 2011, pp. 272–73).

In his treatise, Nūrī prioritizes *Sharī'a* law and rejects any human endeavors for legislation. He writes, "During the occultation, people should return to the successors of the Imams because they are deserved to deduce from the book and tradition, and it does not mean legislation" (Nūrī [1908] 2011, p. 273). Based on these premises, Shaikh finally issues his *fatwa* against constitutionalism as follows: "Constitutionalism is contrary to the religion of Islam ... and an Islamic government cannot come under the constitution except by eliminating Islam. Therefore, if anyone tries to bring us Muslims under constitutionalism, this is an attempt to destroy the religion. Such a person is an infidel, and it is obligatory to shed the blood of an infidel." (Nūrī [1908] 2011, p. 273).

As briefly explicated, Shaikh Faḡl-Allāh's jurisprudential resentment towards the constitutional movement was rooted in the idea that constitutionalism was in contradiction with Islam. In order to justify his critical position, he put all his efforts into illustrating the fact that there is no room for equality and freedom in Islam. However, the fierce debates triggered by Shaikh Faḡl-Allāh eventually provoked a group of pro-constitutional jurists to enter the battlefield. Equipped with similar rhetorical weapons, they attempted to defend some fundamental principles of constitutionalism, which led to a quarrel between the pro-and anti-constitutional '*ulamā*' at one of the most critical moments in the history of constitutionalism in Iran. This quarrel provided religious legitimacy for the movement and eventually strengthened its theoretical basis.

5. The Arguments of the Pro-Constitutionalist ‘Ulamā’ to Legitimize the Movement

During the lesser despotism, a growing body of work was published by pro-constitutional jurists to support the movement. In this section, the four most important treatises contributing to the revival of this movement are discussed.

First, we examine the treatise entitled *Maqālay-i su’āl va javāb dar favāyid-i majlis-i shaurāy-i millī* (Question and Answer on the Benefits of the National Consultative Assembly) by Sayyid Naṣr-Allāh Taqavī (1871–1948), a constitutionalist cleric and a representative of the first Majlis. As the title suggests, the author’s main objective is to explain the locus of the National Consultative Assembly in a constitutional government and discuss its benefits. Considering the developments in international relations in the new era, the author notes that the only way to strengthen the Iranian political system is to adopt various methods to deal with these international changes. He believes that reforming the existing political order is necessary for dealing with these changes. In his view, the constitutional government is the only system that can enable Iranians to join the newfound international relations (Taqavī [1907] 2011, p. 552). The author believes that the main principles of the European civilization are derived from Islam. In addition, he thinks that the secret of the progress of the European countries lies in the enforcement of the laws. In his view, the Islamic world suffers not from the lack of legal systems, but from the lack of institutions that can enforce these laws (Taqavī [1907] 2011, p. 555).

Although Sayyid Naṣr-Allāh, like most of the religious scholars in his time, had correctly realized that the main feature of constitutionalism was the rule of law, he was not able to understand the differences between the foundations of the modern European legal systems and Islamic *Sharī’a* law. Therefore, he supposed that the developments in the European legal systems, and the modern institutions, had their origins in Islam (Taqavī [1907] 2011, p. 556). Of course, one might consider this and similar opinions as shrewd strategies to defend the constitutional movement at the time some opponents tried to undermine it by highlighting the conflict between Islam and constitutionalism. However, it should be noted that ignoring these essential differences left some of the modern fundamental concepts in a state of ambiguity. Only a handful of the Iranian intellectuals were able to realize some of these differences because of studying in the West. The pro-constitutionalists (e.g., Taqavī) were not able to comprehend the meaning of constitutionalism or the main functions of the parliament, which could be due to the ambiguity of the fundamental concepts. The following is an example of this misunderstanding: “In fact, the benefits and characteristics of the National Consultative Assembly for us are that the Islamic rules are implemented for appearing their benefit” (Taqavī [1907] 2011, p. 556).

Despite the contradictions in which the author is caught, it could be stated that his treatise was an important one in defense of the newly established institutions in Iran. The contradictions in the treatise reflect the ambiguities that pervaded the theory of constitutionalism. Although the efforts of Iranian constitutionalists to defend the fundamental principles such as freedom and equality finally yielded results with the establishment of the first parliament, the conflict between the human law and the principles of *Sharī’a* was not a problem that could be easily overcome. This conflict quickly became a major problem, assumably rooted within the Iranian legal systems thus far.

Bayān-i Saltanat-i Mashrūṭa va favāiduhā (Expressing the Constitutional Monarchy and Its Benefits) by Imād al-‘Ulamā’ Khalkhālī is another treatise in which the author’s willingness is demonstrated to defend the rule of law. Imād al-‘Ulamā’, as a *Shi’ite* jurist, believed that constitutionalism, as a political system based on freedom and the rule of law, “has nothing to do with religiosity and religious beliefs” (Khalkhālī [1908] 2011, p. 21). In other words, the constitutional system is a mundane system for preserving people’s worldly interests, which could explain why it is outside the realm of religion. Because the *Sharī’a* is silent about politics, there is no conflict between Islam and the constitutional government. However, Imād al-‘Ulamā’ considers Islam as the last and the most perfect religion, including the best laws of all times, and believes that the main principles of the European legal system are derived from the Qur’an and the books of the Imams

(Khalkhālī [1908] 2011, p. 25). The difference is that the Europeans, in comparison with the Iranians, are more rational and perfect because the rule of law is high on the agenda and they consider the law to be the only ruler regulating all their affairs (Khalkhālī [1908] 2011, p. 29).

In general, Imād al-‘Ulamā’, like all pro-constitutionalist jurists who firmly believed in the perfection of *Sharī‘a*, concludes that the main problem in Iran is not the lack of law or legal systems, but law enforcement. Thus, he strongly believes that there is no need to adopt the European legal system and apply it in Islamic lands. It appears that the major predicament that prevented the constitutionalist authors, such as Imād al-‘Ulamā’, from solving the contradictions emerging in their works stemmed from the fact that the reconciliation of Islam, and some fundamental concepts such as freedom and equality, were problematic. Despite their efforts to develop a new interpretation of Islam as a religion of freedom, they eventually succumbed to the core of Islam, namely, *Sharī‘a* law. It appears that this problem was rooted in the fact that the European constitutional state had been established based on the theory of human’s unconditional and categorical natural rights, whereas the Islamic legal system was developed on the basis of different theological and anthropological attitudes that prevented the emergence of such a theory (Crone 2004, pp. 281–82).

Mullah ‘Abd al-Rasoul Kāshānī (1863–?) was another author who triggered a discussion on the religious legitimacy of constitutionalism. In his *Risālah Inṣāfiyyah* (*Treatise of Equity*) published in 1909, he tries to respond to the criticisms of the anti-constitutionalist jurists. The author considers Islam as a religion of freedom and provides a theoretical basis to defend the major principles of constitutionalism. Kāshānī was well aware of the fact that constitutionalism, as a theory based on freedom and equality, could not be defensible from the viewpoint of the traditional understanding of Islam. Therefore, from the very beginning, he attempts to show that his new interpretation of Islam could prepare a context in which a reasonable defense of constitutionalism would be possible. Considering the two Islamic legal maxims, namely *al-Tasalluṭ ‘alā al-Māl* (the right of ownership) and *lā Ḍarar wa-lā Ḍirār* (no harm shall be inflicted or reciprocated), he emphasizes “freedom and servitude function as the criteria to distinguish a human from an animal. The human must be free. He is not human until he is free. The right to freedom means that a human is independent in his soul, property, family, home, business, and livelihood, and he is independent in press, beliefs, speech, movement, stillness, etc. Therefore, freedom is a part of human nature. Whoever attains this nature could be considered as a human. Otherwise, he is an animal or inferior to an animal.” (Kāshānī [1910] 2011, p. 542)

Taking the legal maxim of “no harm” into account, Kāshānī developed his theory of freedom to explain the distinction between “freedom” and “arbitrariness” or “unrestrainedness”. He believes that freedom, in contrast to arbitrariness, is based on adhering to the law and belongs jointly to all human beings. The law can gain the upper hand in a free society, and everyone must obey it. Thus, whoever does not obey the law intends to be obstinate and violate the rights of others. According to the author, “the law must be perfect, i.e., it must include freedom and comfort of all people so that all human beings can benefit from” (Kāshānī [1910] 2011, p. 543). He believes that *true* freedom may be achieved when the full weight of the law is applied in society because “as long as people consider their ruler to be a human being, they deprive themselves of civilization and progress. They can only grasp progress and prosperity if they recognize the law as a ruler” (Kāshānī [1910] 2011, p. 544). According to Kāshānī, the rule of law is rooted in the *Shī‘ite* theory of justice as he considers the meaning of justice to be obedience of the laws and rules and believes that justice was originally an “Islamic virtue” (Kāshānī [1910] 2011, p. 545). Although this virtue has disappeared in Islamic communities, the European nations have implemented it based on the theory of the rule of law (Kāshānī [1910] 2011, p. 544). Kāshānī considers all types of freedom, such as “freedom to elect parliament members as well as freedom of speech, thought, and press”, as the fundamental principles of a constitutional system (Kāshānī [1910] 2011, p. 544). In his view, freedom is one of the major concepts

of constitutionalism, which appears to be inconsistent with the interpretation of Islam developed by the anti-constitutionalists. The significance of *Risālah Insāfiyyah* was that it put a new account on Islam and tried to demonstrate that there was no conflict between Islam and constitutionalism. Nevertheless, it should be noted that the pro-constitutionalists' defense of the rule of law and liberty did not have enough power to go beyond superficial discussions and result in a coherent theory.

The most coherent and systematic treatise to support the constitutional government was Muḥammad Ḥossein Nā'īnī's *Tanbīh al-ummah wa tanzīh al-millah* (The Awakening of the Islamic Nation and the Purification of the Islamic Creed) ... In his treatise, Nā'īnī demonstrates his firm commitment to defend the main principles of constitutionalism and the legitimacy of the rule of law. It is worth mentioning that this treatise consists of all principles of the *Shi'ite* political thought and the author put all his efforts into articulating a *Shi'ite* theory of government. Furthermore, he relies on his sufficient jurisprudential knowledge and attempts to respond to the fallacies that run quite counter to the idea of constitutionalism. However, his main objective is to illustrate the weaknesses of Shaikh Faḡl-Allāh Nūrī's counter-discourse.

Nā'īnī takes into account the Islamic jurisprudential theory of *amānah* (trust) and articulates his theory of constitutional government, which could be considered as an innovation in *Shi'ite* political thought. According to this theory, preserving trust is a religious obligation, and occupying it is religiously prohibited. Nā'īnī believes that the government is like a trust in the ruler's hands, which could be the reason why he is not allowed to seize it and portrays himself as an absolute owner. One of the most important duties of the ruler is to protect this trust, the main owners of which are the people (Nā'īnī [1909] 2011, p. 419). He considers the constitution and the National Consultative Assembly as the main pillars of the constitutional monarchy. He thinks that the constitution, which explains the public interest, also sets limits for the trustee (ruler) (Nā'īnī [1909] 2011, p. 420). Violation of these limits is equal to betrayal and, like any betrayal of a trust, could lead to permanent removal from the position of the trustee, in addition to the application of the punishments prescribed by the law against the trustee (Nā'īnī [1909] 2011, p. 421). The second pillar of the constitutional monarchy, namely, the National Consultative Assembly, is a place where the wise and benevolent people, who are aware of the international laws and the political requirements of the age, gather (Nā'īnī [1909] 2011, p. 421). The dissolution of each of these pillars could change the constitutional monarchy, as a system of trust, into an authoritarian one. As Nā'īnī maintains, "all the destruction of Iran is the result of this authoritarian system" (Nā'īnī [1909] 2011, p. 423).

Nā'īnī believes that it is necessary to restrict the authority of the sovereign by taking advantage of all the tools that *Sharī'a* provides during the occultation when it is not possible to establish an Islamic government ruled by the Infallible Imam. Therefore, it might be said that *Tanbīh al-ummah* is a political treatise consisting of the traditional *Shi'ite* theory according to which all kings are unjust during the occultation. In addition, the theory explains that only a government ruled by the Infallible Imam can be considered a religious one. According to this theory, any political authority comes from God and may be placed in the hands of those who have been chosen by Him. In this sense, all types of governments, whether ruled by a just or unjust king, are considered a kind of unjust government. Regarding this essential teaching, although Nā'īnī tends to legitimize any kind of government ruled over by a just king during the occultation, he asserts that these types of governments could not be religious (Nā'īnī [1909] 2011, pp. 433–45).

6. Constitutional State as the Lesser Evil

Our discussion thus far has led us to conclude that the anti-constitutionalist jurists considered the fundamental elements of constitutional thought, namely, freedom and equality, to be in contrast with *Sharī'a*. Thus, the pro-constitutionalists knew that any attempt to articulate the theory of the constitutional government required an interpretation of Islam as a religion of freedom. Nā'īnī, like most scholars of his time, highlighted the

importance of this issue and tried to interpret Islam as a religion of freedom. He was well aware of the fact that the defense of the constitutional government would be possible only when he could respond to the storm of criticism that had been provoked by Shaikh Faḡl-Allāh Nūrī. To achieve this goal, he first scrutinizes the concept of freedom. As mentioned previously, Nūrī considered the concept of freedom in contrast to devotion to God. However, he emphasized the political meaning of freedom, compared freedom in a constitutional government with captivity and servitude in authoritarian regimes, and maintained that the nature and purpose of authoritarianism are to usurp people's free will (Nā'īnī [1909] 2011, p. 446). The main objective of the constitutional movement for Nā'īnī was to transform the absolute monarchy into a government of freedom, and to free people from captivity and servitude. In other words, the constitutional movement was a struggle for political freedom (Nā'īnī [1909] 2011, p. 447).

According to Nā'īnī, the constitutional government is based on the two principles of freedom and equality. He believes that these principles are recognized by Islam and human intellect, regardless of whether or not man believes in God (Nā'īnī [1909] 2011, p. 448). Regarding equality, he thinks that it is the foundation of justice and the spirit of all laws (Nā'īnī [1909] 2011, pp. 449–50). Equality, according to Nā'īnī, is a legal term and functions as a basic component of the constitutional government. In other words, every constitutional system should be evaluated according to its legal system, and the legitimacy of any legal system requires presupposing the idea of justice based on the idea of equality (Nā'īnī [1909] 2011, pp. 451–52). Nā'īnī's understanding of equality, as the most honorable Islamic law, refers to the equal implementation of *Sharī'a* for all individuals. Here again, we see that the discussion of the equality of all human beings is reduced to the equality of law enforcement, which could be due to the fact that Islam is fundamentally incompatible with the theory of the equality of all humans, and any discussion about the equality of individuals before the law, as Shaikh Faḡl-Allāh emphasizes, is meaningless.

According to Shaikh Faḡl-Allāh, the Islamic legal system originated from the Qur'an and the traditions and practices of the prophet of Islam. Therefore, he considers human legislation as heresy and heterodoxy. Nā'īnī takes Nūrī's arguments into account and attempts to demonstrate that human legislation is not *legislation* in its religious sense, and thus not considered heterodoxy. He elaborates that enacting the law to arrange all important matters related to family, city, and country is not related to the concept of legislation as understood by the *Shī'ite* jurists (Nā'īnī [1909] 2011, p. 453). According to Nā'īnī, the constitution and the new judiciary system aim to regulate public affairs, which is the reason why human legislation cannot be perceived as divine legislation. Obeying such laws is not heresy because when a law is enacted by experts in Majlis, it will be obligatory for everyone to obey it. Nā'īnī concludes that the difference between laws enacted to regulate the affairs of a country and *Sharī'a* law is obvious. Therefore, he adds, anti-constitutionalists' view is similar to the view of the *Akhbari* jurists who considered the practical treatises of jurisprudence (*rasā'il-i 'malīyyah*) written by the *Usuli* jurists as hostility with the prophethood during the occultation (Nā'īnī [1909] 2011, pp. 453–54).

According to the anti-constitutionalist jurists, political affairs are related to the realm of *ḥisbah* (accountability), and the righteous mujtahids undertake the duty of dealing with these affairs during the occultation. However, Nā'īnī relies on his jurisprudential premise and indicates that the main issue is the establishment of a "Consultative Islamic Monarchy". Therefore, given the fact that political power was usurped by kings during the occultation, there is no doubt that oversight of the public affairs is the responsibility of the nation itself. In addition, the only means to limit the power of the king in this age is the constitutional system, in addition to the National Consultative Assembly. However, the presence of several mujtahids among the representatives is necessary to examine the compliance of the laws with *Sharī'a* (Nā'īnī [1909] 2011, pp. 455–61). Furthermore, Nā'īnī considers consultation as the basis of Islamic monarchy and believes that the importance and necessity of *volonté générale* cannot be neglected according to this principle.

It appears that although Nā'inī, as a high-ranking jurist and religious authority, strongly believed in the crucial role of jurists as the deputies of Imams, he regarded constitutionalism as a great achievement that paved the way for the establishment of a national state in Iran (Ṭabāṭabā'ī [2006] 2013, p. 524). Although Nā'inī, like most of the *Shi'ite* jurists, holds that during the occultation the establishment of an Islamic government is not possible, he attempts to prepare a religious legitimacy for constitutionalism. It might appear at first glimpse a contradiction; however, it should be noted that the constitutional state for Nā'inī is not the ideal one, but can function as an alternative (the lesser evil according to the *Shi'ite* teachings) to despotism. Thus, it appears that Nā'inī's tract set the ground for the development of the theory of constitutionalism in Iran and served as an innovative approach, which indicates a fundamental transformation in the *Shi'ite* political thought.

The period of lesser despotism ended with the arrival of the armed constitutionalists in Tehran to conquer the city. Muhammad 'Ali Shāh, who had been defeated in the war, abdicated his throne, and took refuge in the Russian embassy. Shaikh Faḡl-Allāh, however, suffered a tragic fate. He was arrested and found guilty and hanged as a traitor in July 1909 (Kasravi [1940] 1984, p. 673; Sharif Kāshānī [1363] 1984, p. 343; Navā'ī [1356] 1977, p. 206). Although his death marked the end of a period of political struggle among the anti- and pro-constitutionalists, his footprint remained in the constitution. Articles 2 and 8 of the Supplementary clearly demonstrate this.

7. Conclusions

In this paper, we attempt to show how the fundamental concepts of law, freedom, and equality provoked a group of *Shi'ite* jurists to launch an attack on constitutionalism. It is indisputable that every constitution that devotes a section to securing the rights of the nation must take for granted freedom and equality as natural rights. However, the opponents of constitutionalism in Iran considered freedom and equality to be detrimental means for the destruction of religious beliefs. The pro-constitutional jurists were aware of this fact and tried to distinguish between religious and customary affairs, to demonstrate that their meaning of freedom was limited to the realm of customary freedom. It should be noted that two different and contradictory perceptions of freedom and equality emerged among the religious jurists in Iran during the constitutional movement. While the anti-constitutionalists defined freedom as a means of liberation from all restraints and as a form of irreligiosity, the pro-constitutionalists sought to introduce Islam as a religion of freedom. Although it is quite clear that their interpretation of Islam was imbued with a kind of naivety, we should not ignore the fact that the constitutional movement could have been suffocated from the very beginning if it were not for the efforts of pro-constitutional jurists.

It is possible to argue that the Iranian constitutional movement contributed to profound changes in cultural, social, and political spheres. Furthermore, it led to a fundamental shift in the old regime and a change in the traditional manner of governance.¹⁷ As a result, the absolute power of the sovereign was dramatically restricted by the constitution and the Iranian people grasped the opportunity to participate in political affairs. Yet, we should consider the fact that the constitutional movement in Iran was a vulnerable seedling, and has always been threatened by autocracy and religious orthodoxy.

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Notes

- 1 Modern ideas and concepts first entered the country through Iranian travelogues. The first and most important of them can be listed as follows: *Tuhfat al-'Ālam* (Masterpiece of the World) written by 'Abd al-Latif Shūshtarī (1759–1805) in 1801; *Masīr-i Ṭālibī fī Bilād-i Afranjī* (Travels of Mirza Abu Taleb Khan in Asia, Africa, Europe) written by Mīrzā abū Ṭālib Khān (1752–1806) in 1803; *Mir'āt al-aḥwāl-i jahān'numā* (A Mirror for the History of the World) written by Aḥmad Behbahānī (1777–1819), in 1804; *Ḥayrat'nāmāh* (The Book of Wander) written by Abul Ḥasan Khān Īlchī (1776–1845) in 1809.
- 2 For the distinction between constitution and constitutionalism, see: (Brown 2002, pp. 97–104).
- 3 Our knowledge shows that the concept of 'Adālat'khānah was first introduced into Iranian constitutional literature by 'Abd al-Latif Shūshtarī in 1801. This concept was the Persian translation of the "House of Justice" in the eyes of the British.
- 4 Of course, the conflict between European laws and shari'a was not limited to this period, but can be traced back to the time of Mīrzā Ḥusayn Khān Sipahsālār. For further discussion, see (Ādamīyat [1351] 1972, pp. 159–76).
- 5 For a further discussion on the place of poll tax in the Islamic communities, see (Scott 2010, pp. 16–33).
- 6 This mausoleum has always been an important religious destination for Shi'as in Iran.
- 7 Extremists generally belonged to the Azerbaijan Association, which was established shortly after the Revolution. The association also had a military branch called *Markaz'i Ghaybī* (the Secret Center), which published articles against the Shah and courtiers. The members of the center, who had close ties with the Caucasian Social Democrats, sought to overthrow the monarchy in Iran. For a detailed discussion see (Ittiḥādīyyah [1361] 1982; Afary 1996, pp. 78–81).
- 8 It is called lesser despotism because it lasted for less than a year. During this short period, many journalists, members of parliament, and constitutionalists were arrested and executed. The period came to an end when the armed constitutionalists of Tabriz, Gilan, and Isfahan conquered the capital. The Shah sought refuge in Russia's embassy after he no longer could stand up to the opposition.
- 9 As Abbas Amanat has explained, the Russian authorities were worried the Iranian Constitutional Revolution would ignite unrest in the Caucasus and gain the Iranian radicals and Baku revolutionaries the upper hand. They also thought that the fall of Muḥammad 'Alī Shāh may potentially strengthen the position of the pro-British Zill al-Solṭān, the Shah's half-brother, who longed for the throne (Amanat 2017, pp. 348–49). It was for these reasons that Russia supported Muḥammad 'Alī Shāh.
- 10 #x201C;And fear the Fitnah (affliction and trial, etc.) which affects not in particular (only) those of you who do wrong (but it may afflict all the good and the bad people)"', Qur'an, 25:8.
- 11 For a detailed discussion about commanding right and forbidding wrong in Islam, see (Cook 2010).
- 12 According to the Shi'i tradition, *hujjat* refers to the individual who represents God's "proof" to human beings at any given time in human history. Regarding the Imami school of thought, such an individual is either a prophet or an imam, and there is always one such *hujjat* at all times. It illustrates the fact that an imam has almost the same function as a prophet, and that the ultimate mediator between God and humanity must be a person rather than a text. It is worth mentioning that Ayatollah Khomeini articulated his notion of the religious and political authority of the jurist (*vilāyat-i faqīh*) based on this doctrine. For further discussion on *hujjat*, see (Dakake 2004).
- 13 The equality of non-Muslims and Muslims was theologically problematic for orthodox Islamists in the Islamic lands during the period of transition and it was not specific to Iran. On this problematic in Egypt and the solution of the Egyptian intellectuals, see (Scott 2010, pp. 147–65).
- 14 It should be noted that during the twentieth century, the jurist's religious authority was gradually replaced with the idea of the jurist's political authority. The final articulation of the latter could be traced back to Ayatollah Khomeini's prominent work *Valāyat-i Faqīh*. For further discussion, see (Amanat 2007).
- 15 Massie and Afary address the main sources of Iran's first constitution (Massie and Afary 2019).
- 16 In Islamic jurisprudence, *Ḥudūd* refers to fixed and mandatory punishments for certain offenses mentioned in the Qur'an and sunnah. See (Peters 2009).
- 17 By traditional manner of governance, we mean a kind of political system in which the shah had absolute power over the subjects and no codified laws existed. According to this system, the will of the shah determined the law.

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