



Comparison of the Constitutional and Legitimist Scholars, Concerning the Parliament, the Principle and Limits of Legislation and the Majority

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Abstract

The introduction of the concept of the Constitution and related concepts as well as the existence of these concepts in the political-struggle literature of the people and scholars in Iran caused serious challenges and discussions. Among them is the concept of parliament, the subject of legislation, the limits of legislation and the majority. This paper aims to analyze and compare the views of scholars concerning this issue: Sheikh Fazlullah Nouri, Aliakbar Tabrizi and Najafi Marandi from among those who tended to Legitimacy and Allameh Na'ini, Abdulhossein Iari, Mahallati, Thiqat al-Islam Tabrizi and Agha Najafi Isfahani from among those who tended to Constitution, based on the historical-comparative method. Findings show that, firstly, there is a serious difference of opinion regarding the constitution and the concepts in question, among the scholars who are referred to as constitutionalists and legitimists in general, and these two sets should not be viewed simply, and secondly, sometimes there is no fundamental difference of opinion between constitutionalist and legitimate scholars.

Keywords: *Parliament; Legislation; Majority; Legitimist; Constitutionalist; Scholars*

Introduction

The constitutional period is one of the most important and sensitive turning points in the contemporary history of Iran and has had a profound impact on the subsequent socio-political developments of this borderland and has been the source of many and endless intellectual challenges continuing to this day.

Among the reasons for the importance of this period is the presentation of new political issues in the field of government, such as the type of relationship with the West, giving economic, political and cultural privileges to foreigners, legalism, freedom, struggle against tyranny and constitutionalism. Proposing such issues caused reaction from the Shiite scholars, who were present among the community and did not consider themselves separate from the people. This reaction took different forms among them, which appeared in their statements, writings and political actions.

Some scholars such as “Mohammad Hussein Ibn Ali Akbar Tabrizi” in Tabriz, “Mujtahid Khomami” in Gilan, “Akhund Molla Qurban Ali Zanjani” in Zanjan, “Sheikh Abolhassan Najafi Marandi”

and at the head of them the late “Sheikh Fazlullah Nouri” in Tehran may be mentioned as the legitimists and some like “Seyed Abdolhossein Lari” in Shiraz, “Haj Agha Noorullah Isfahani”, “Agha Najafi Isfahani” in Isfahan, “Mirza Ali Theghat al-Islam” in Tabriz, and Mohammad Ismail Mahallati Gharavi and Mirza Mohammad Hossein Naeini in Najaf can be considered as constitutionalists. Both the legitimists and constitutionalists had serious supporters among the Najaf Maraji' scholars. The late Seyed Mohammad Kazem Yazdi, the owner of ‘Urwat al-Wuthqa, was a supporter of legitimism, and Akhond Mullah Kazem Khorasani, Mullah Abdullah Mazandarani, and Haj Mirza Hussein Bakhl Mirza Khalil were supporters of constitutionalism.

It can be useful to study and analyze the views and positions of constitutionalist and legitimist scholars on the new issues proposed at this time, such as “parliament and legislation”, “freedom”, “equality”, “tyranny” and “constitutional government”, in order to answer the questions: “What are the positions of Shiite scholars towards concepts such as the parliament, the principle and limits of legislation and the majority?”, and “What are the differences and commonalities between constitutionalist and legitimist scholars?” For examining the views of the members of both groups on the above-mentioned central issues, it is necessary to note two points: first, we will mainly express the positions of those scholars who have left a written work, and second, according to the views of constitutional authorities of Najaf on the book *Tanbih al-Ummah* and *Tanzih al-Milla* of Naeini, their views are mentioned equally to Naeini's. In addition, due to the similarity of views of Ayatollah Seyed Mohammad Kazem Yazdi and Sheikh Fazlullah Nouri and the support of the legitimist sit-ins in the shrine of Hazrat Abdul ‘Azim, only the Sheikh's positions will be expressed here.

This article intends to examine concepts such as parliament, legislation, majority and so on according to the constitutionalist and legitimist scholars.

A. Legitimist Scholars

A-1- Sheikh Fazlullah Nouri

Sheikh Fazlullah Nouri, as the leader of the legitimacy movement, accepted the existence of the parliament and emphasized its necessity, as he wrote:

“O people, I do not deny the National Assembly in any way; Rather, I know my involvement in establishing this foundation, first of all. Even now, I am the same as I was. There has been no change in the destination and origin” (Turkman, 1983, v. 1: p. 245).

Or in one of his writings he said:

“From the glorious series of authorities of the nation, no one denies the Islamic National Assembly” (Ibid., p. 241).

Or wrote in another place:

“It is a lie if someone writes, says and publishes that ‘His Excellency Hujat al-Islam wal-Muslimins, Mr. Haji Sheikh Fazlullah, peace be upon him, denies apparently the National Assembly’” (Ibid., P. 245).

All the concern of Sheikh Fazlullah Nouri was that this parliament should act in accordance with the laws and orders of Shari'a, and also to legislate in accordance with customary issues and to refrain from entering into Shari'a issues that are the specialty of Mujtahids. He wrote:

“I want the National Assembly that the general Muslims want, i.e., of course, the general Muslims want an assembly that does not legislate against the Qur'an, against the Shari'a of Muhammad (PBUH) and against the Ja'fari (PBUH) holy school” (ibid).

In response to the question of some people about the legislative limits of the Parliament, he states that there will be no change in the Islamic rules, because Iran is an Islamic land and the reference of all Islamic rules after the Holy Prophet (PBUH) and the Imams (AS), Islamic scholars and mujtahids. No one other than scholars has the right to interfere in the rules of Shari'a (Abadian, 1995, p. 39). He adds in this regard:

“...Only in this parliament officially the affairs of the government and the reforms are royal, which used to take place in the form of independence and now must be done in the form of councils, and in no way it has the right to interfere in the affairs of Shari'a and Islamic rules of the twelfth Imami, whether they are related to this world or next world.”

He then expressed hope that everyone will take action in “the establishing this honorable parliament” (Turkman, *Ibid.*, v. 2: p. 66).

Sheikh Fazlullah Nouri considers the purpose of forming the parliament for the welfare of the nation and the reform of the governmental affairs” (*Ibid.*) and states that the authority of the parliament is to limit and legalize royal and governmental affairs, which used to be independent. From the Sheikh's point of view, issues related to Shari'a, both in matters of livelihood and in matters of Resurrection, are exclusively in the field of expertise of the Mujtahids, and therefore he considers the acceptance of the majority vote illegal if it has not the permission of the jurist and considers it heresy. He writes in this regard:

“Current laws in the country regarding the lives, property and dignity of the people must be according to the fatwas of the just Mujtahids in every age who are the source of imitation of the people, and therefore all laws must be obeyed and under the sights of the Mujtahids to release all oppressions which cause thousands of religious problems for the religious people, and the position of the government and its implementation by the judiciary and military is only the implementation of the rulings issued by the just Mujtahids, as the duty of every *mukallaf* is to adopt the ruling of a just mujtahid” (Turkman, *Ibid.*, p. 360).

In other words, since the members of parliament are not “aware of the interests and corruptions of the whole world personally and typically” and cannot act completely in justice discerning the benefits of the people, the right to legislate is exclusively in the hands of the Shari'a and “the owners of the science will not have the right to interfere in the rulings” (*Ibid.*, p. 359-360). Therefore, the delegates should not interfere in the affairs of the Shari'a “unless” we limit them to “the opinion of five scholars” (*ibid.*) This was exactly what Sheikh Fazlullah asked during Article 2 of the Second Amendment to the Constitution. It should be noted that Sheikh Fazlullah was worried that even this principle would not be implemented, according to the circumstances and issues that had arisen. He thought that since the Parliament was the only legislative authority, it caused the deviation in religion, and that is why he writes:

“It should not be limited in the opinion of five chosen people because its corruptions are innumerable. The evidence is that some incompetent people changed the branches of religion and the rulings of the judiciary based on their fear or passion. The result is that the rest of religion, i.e. the principles, will be changed by others and so they represent falsehood instead of the truth” (*Ibid.*, p. 360).

Therefore, Sheikh Fazlullah asked that “the appointment of the supervisory board of all ages should be done only by the Mujtahidis, whether they themselves choose the board or they are chosen by their own vote” (*Ibid.*, p. 268).

In his view, “the duty of lawyers is only to acquire the power of repulsion or benefit for their clients and matters related to property, army and country” (*Ibid.*, p. 361). Sheikh Fazlullah with his knowledge of the essence of the constitution in the West, denied it as against the religion (Abadian, *ibid.*, p. 43) and also because he considered following the rules of Islam as the only way to grow and prosper

and saw behavior like Europeans as the cause of the destruction of religion, he also accepted a parliament whose scope of legislation was limited to the customary issues. He wrote in a letter to Mr. Najafi Isfahani:

“It seems that if the actions of the country are based on taking the religious tax on the necessary alms like zakat and others, and in other words, on taking the one tenth from what is grown from the land, as well as on taking only for the expenses of the eight professions for the sake of God, in a way that does not need to be mentioned, and your excellency pays attention to all of it, the works are reformed and born in the honor of Islam. Although theological debates are very precise, the occurrence of an action is inevitably due to the correctness of Islam and the benefits associated with this. Other methods, such as brought from the nations of the Europe, cause the destruction of the religion and the degeneration of Islam, and the fear of its occurrence is clear. In particular, if the title of the Majlis is the title of the new monarchy on the Shari'a laws from the very beginning, Islam will always be strong” (Kasravi, 2537, p. 288).

In a conversation that took place between him and Seyed Mohammad Tabatabaei during the Great Migration to Qom, when Seyed Mohammad Tabatabaei in a part of his speech about the benefits of the constitution, which was mainly approved by Sheikh Fazlullah, mentioned that “the constitution is something that will legislate for the king, the parliament, the ministers, the rich, the lawyers and so on that will limit the king and the parliament and all the ministries. In short, the constitution is something that will limit all the work of the government, the nation, the Shari'a, the custom, the farmer, etc.” Sheikh Fazlullah replied:

“But as for the law that you said will be enacted, first, it should be noted that our law was written and given to us 1300 years ago. Assuming that they want to write a law today, it must be in accordance with the Qur'an of Muhammad and Ahmadi Shari'a. And the other thing that you said ‘will be a limit for the Shari'a’, also you must know that there is no limit for the Shari'a” (Zargarinejad, 1995, p. 18).

From various expressions of Sheikh Fazlullah, it appears that he is not against the Majlis, but only seeks to correct and complete it, as he writes in one of the bills or in another place he says:

“As for the parliament, you knew in the first place that there is nothing wrong with it and everyone wants it; But as for religious matters, all scholars, without exception, say that this assembly should not be against Islam. It should be the commandment of the good and the prohibition of the bad and the guardian of the bases of Islam” (Turkaman, *ibid.*, vol. I, p. 340-341).

Another point is that Sheikh Fazlullah Nouri and his like-minded people were not against the existence of the constitution and considered the formation of the parliament to be focused on it, as he says in this regard:

“Some people are arguing that we do not want a constitutional system. What is that word? Do you hear or not? And do you know the purpose or not? This statement is wrong in all aspects and causes the violation of the rights of the population, and even leads to the corruption of the principle of the parliament” (*Ibid.*, p. 347).

Or he states in other place:

“The National Assembly and the Bar Association and its envoys, and the goal of eliminating oppression, spreading justice and reforming the country, without a constitution that the general population, rulers and officials of the country follow in that way, how is it imagined? Planning, which is the first stage of practical wisdom, cannot be done without the order of the constitution. How can national planning be possible without law?” (*Ibid.*)

But Sheikh Fazlullah and his colleagues could not accept the constitution which did not originate from Shari'a but was a reversal of the European constitutions. He says in this regard:

“Brother, the statute, the statute but Islamic, that is, the same law of Shari'a, which around 1300 and more is among us. The sentence from which our corruption can be corrected. Now let it be implemented as the law” (Ibid., p. 356).

Or he, in contrast to the intellectuals' belief in translating the constitutions (exactly) of some Western countries, says: “What has happened is that today the order of our justice must come from Paris and the version of our Council must come from England” (Ibid., p. 150).

Although Sheikh believed in the existence of the parliament and repeatedly acknowledged it in his statements, he was strongly opposed to the existing parliament, writing:

“Even if a thousand mujtahids define the building of the Majlis on the basis of the good and the prohibition of the evil, the support of the oppressed and the preservation of the bases of Islam, and if a Muslim sees that this is not the case and hence the existing parliament is based on banning the good and circulating the bad, the fatwa of the mujtahids will not be applicable at all. Especially if you see that the source of the occurrence and spread of chaos and all these corruptions are because of the ruling of the existing parliament, do you not see how much the dominant Islamic beliefs of the people have changed? O Muslims! What scholar says that a parliament that mitigates the oppressor and implements the rules of Islam is bad and should not be?! All the words are about a few non-religious, atheist liberals, for whom the rules of Shari'a are restricted and they want to prevent this assembly from being officially bound by the rules of Islam and its implementation, and every day they cast doubt for a reason” (Zargarinejad, *ibid.*, p. 183).

A-2- Muhammad Hussein bin Ali Akbar Tabrizi

Another legitimist scholar is Mohammad Hussein bin Ali Akbar Tabrizi. Although he did not cooperate extensively with the legitimists in his practical efforts, he wrote a treatise entitled “Discovering the Purpose of Constitutionalism and Authoritarianism” (*Kashf al-Murār min al-Mashrū'a wal-Istibdād*) in rejecting constitutionalism (*ibid.*, p. 101).

While accepting the parliament, he emphasizes that this parliament should not act contrary to the laws of Shari'a. Even the formation of such a parliament in which laws contrary to the Shari'a are not approved is considered as prohibition of bad and its destruction and opposition to it is considered as the extent of opposition to the owner of Shari'a (*ibid.*, p. 107) and considers “the good formation of this assembly as a place of agreement” (*ibid.*, p. 106). He believes that the constitutional parliament by passing laws such as collecting taxes and customs, taking the money for cleaning and lighting, the census report of nation and animals and setting of the rate (*ibid.*, p. 110) have approvals that are against the Shari'ah and therefore are against Islam. It is concluded that this existing parliament is different from the promised one, because in this assembly, the condition of not opposing the Shari'ah is not recorded. With these details, he considers the difference between constitutionalist and legitimist scholars, not in (logical) “major” but in “minor” (*Ibid.*, p. 107).

In the position of discussing legislation, he considers gathering and consulting, writing a law and giving credit to a majority of votes to be against the Shari'ah and believes that the Shari'ah does not need to be consulted. He considers only the consensus of scholars as credit and not the consensus of others (*Ibid.*, p. 109). He therefore suggests that “first, if possible, at least one knowledgeable and just mujtahid” and if it is not found, “a group of just knowledgeable scholars should be Muqtada (to be imitated) and the rules of Shari'ah including transactions, worship, limits and politics must be taken from them” (*Ibid.*, p. 112). That knowledgeable mujtahid or a group of just scholars in fact play the role of “Legislative Power” and “their supporters” as the “Executive Power” perform the task of execution. “The Senate, which is made up of large religious families, must also be formed to oversee the affairs of the country” (*Ibid.*)

Tabrizi considers the reason for other states to turn to the constitution, parliament and legislation as their lack of access to divine laws and writes in this regard:

“In the constitutional states on earth, because the divine decrees are not sufficient and complete about the civil minor events and politics among themselves, they should probably arrange a parliamentary assembly composed of wise men and scholars and gain the benefit of the state and the nation by a majority of votes” (Ibid.)

Sheikh Fazlullah, referring to this reason, i.e. the perfection of Islam, did not see any reason to issue the law. He writes in this regard in his treatise “Constitutional Sanctity”:

“In Islam, it is not permissible for anyone to legislate and issue the ruling, and Islam is not incomplete that may somebody complete it. In the new cases, the people should refer to the agents that are indeed the successors of the Imam (as). They should deduce from the Book and Traditions and then legislate and issue a verdict” (Ibid., p. 166).

He states in this regard that “neither consensus nor the majority of votes have been considered as evidence in our Ahkam” (Ibid., p. 132).

A-3- Sheikh Abul Hassan Najafi Marandi

Sheikh Abu al-Hassan Marandi in his treatise entitled “*Dalā'il Barāhīn al-Furqān fī Butlān Qawānīn Nawāsikh Muhkamāt al-Qur'an*” (Evidence of the proofs of the differences in the invalidity of the laws of the abrogating verses of the Qur'an) with reference to many verses and hadiths, including the verses “ولا حبه في ظلمات الارض و لارطب و لا يابس الا في كتاب مبين” and “كل شيء احصيناه في امام مبين”, as well as considering the issue of the finality of the Prophet (PBUH) who said everything that was necessary for human beings until the Day of Judgment, condemns the supporters of the Majlis and the legislature and writes:

“It is obvious what will happen if a group that is in conflict with its Creator like Nimrod and has shown new opposition every day, in a country where the Qur'an rules, invents the law, abrogates the divine rules” (Ibid., p. 197-200).

Under the fourth argument of his treatise, he deals with “clarifying the guilt and ugliness of choosing lawyers in issuing laws with incomplete intellects and the multiplicity of false opinions and corrupt comparisons in falsifying the law of the *muhkamāt* of the Qur'an of the Seal of the Prophets (PBUH) (ibid., p. 203). He emphasizes that they Ignored the miraculous commands of the Prophet (PBUH) and fabricated the new provisions of the constitution, putting this constitution before the *muhkamāt* verses of the Holy Qur'an and not shaming God and His Messenger (PBUH) (Ibid., p. 205). In fact, he considers choosing lawyers and the legislature to be opposed to the verses of the Qur'an.

Marandi also rejects the validity of the majority and mentions those who believe in it by quoting a few verses, such as “و إن تطع اكثر من في الارض يضلوك عن سبيل الله إن يتبعون الا الظن ان هم الا يظنون” (Ibid.)

B. Constitutionalists

B-1- Najaf Authorities (*Mujtahids*)

In contrast to this group, the authorities (*Mujtahids*) of Najaf (Akhund Khorasani, Sheikh Abdullah Mazandarani and Haj Mirza Hossein Tehrani) approved the existing Constitutional Parliament. They believed that if somebody opposes it, indeed he opposes the Shari'a, for they considered it an Islamic Parliament. In response to the questions of the people of Tehran about the constitution and the National Assembly, these three authorities had the following sentences:

“An assembly whose establishment is to eliminate oppression, defense the oppressed, command the good and forbid the evil, strengthen the nation and the state, promote the status of the subjects and

preserve the bases of Islam is certainly preferable, rationally, religiously and customarily. Its opponent is against the law of Islam and the owner of the Law” (Kasravi, *ibid.*, p. 382).

Akhond Khorasani reports the formation of the parliament as “the Great Tiding”. He is happy because he is sure that the current parliament will make every effort to draft a law commensurate with the Shari’ah. Akhond Khorasani and Sheikh Abdullah Mazandarani after the proposal of the second principle of the constitutional amendment by Sheikh Fazlullah and its approval by the parliament in a way that led to the migration of constitutionalists to the shrine of Hazrat Abdul Azim (Jahanshahloo, 2003, p. 30) via a telegraph to Sheikh Fazlullah, addressing the Majlis, reminded the point that “the heretics of the age, with wrong thought of freedom, consider this time to spread heresy and atheism and denigrate this strong foundation”, considered it necessary that “another eternal material in repelling this heresy and execution the divine rulings of the God Almighty should be written on them and the non-prevalence of denials should be included so that, in the sight of God Almighty, the intended result will not be arranged for the honorable parliament, and the misguided sect will be disappointed” (*Ibid.*)

One of the petitions of the legitimists from the parliament was that the article proposed by Akhond Khorasani regarding “the heretics of the age and carrying out the divine rulings on them and the non-prevalence of denials” should be included in the constitution (*Ibid.*, p. 33).

Akhond Khorasani considered the Parliament as an institution “commanding the good and forbidding the evil” that should monitor the performance of the government in implementing the laws based on Shiite jurisprudence and be responsible for guaranteeing its implementation (*Ibid.*, p. 42).

B -2- Mohammad Hussein Naeini

Mirza Naeini also defended the constitution and explained its pillars by writing the book *Tanbīh al-Ummah and Tanzīh al-Milla* at this time. Naeini considered it necessary to limit oppressive domination and tyrannical rule. In his view, since on the one hand, the hands of the people are short of the infallibility of the Imam (AS) and the position of General Agents has been usurped, and on the other hand, it is not possible to prevent this usurpation (Naeini, 1982, p. 41), the only means of limiting tyranny and arrogance is the establishment of the constitution, the conclusion of the council and the appointment of elected officials. In fact, in his view, the Council is an obstacle to the absolute and arrogant power that carries out the lust of the usurpers (*ibid.*, p. 56-58).

Emphasizing “having a constitutional order that restricts the above mentioned, distinguishes the typical interests and the degree of domination of the sultan and the freedom of the nation and recognizes all the rights of the classes of the country”, he states that these laws must agree with the requirements of religion and in fact do not contradict religion (*Ibid.*, p. 14). Regarding legislation, with reference to the verse “and consult them in the matter” (وشاورهم في الامر) he states that since the pronoun “هم” belongs to the whole type of *ummah*, Immigrants and Helpers. Moreover, according to the word “امر” belongs to all political affairs. So everyone can be addressed by the consultation and all affairs belong to the consultation. He states however that the Shari’ah rulings never belong to the consultation (*Ibid.*, p. 53-54). Allameh Naeini considers two ways in the correctness, legitimacy and validity of the opinions and decisions of lawyers to be sufficient: first, either they are authorized by the mujtahids or second, the mujtahids participate with them in drafting matters and passing laws (*Ibid.*, p. 15). As for legislation, he states that the scope of legislation of lawyers does not include general and partial titles of Shari’ah, that are always fixed and compulsory but only refers to titles that are different and can be changed according to the difference of time and needs. Mirza Naeini refers to the constitution as a set of rules and laws that do not challenge the Shari’ah (*ibid.*, p. 97-99). In refuting this statement that the constitution is heresy, he states that the constitution is not considered heresy because heresy is when they legislate a fake rule (partial or general) as a Shari’ah rule (*Ibid.*, p. 73-77). Considering the usurpation of usurper obligatory and not considering it possible except through the drafting of the constitution, Mirza Naeini mentions the existence of the constitution as introductory obligatory.

Regarding laws, through dividing them into two types of Shari'ah and customary and referring to the tradition Umar ibn Hanzala (*maqbulah*), he proves the legitimacy of interpreting the majority of opinions in customary matters and their non-heresy. In contrast, about the written Ahkam in Shari'ah which are the same early prescribed rules, he states that these rulings will never be changed over time. Acceptance of these rulings is obligatory and their recognition is on the scholars' and mujtahids' charge. He believed that the duty of scholars and mujtahids is to express generalities and to identify the subject and correspond to that generality is the duty of custom. He raised all these issues in order to preserve the bases of Islam (*ibid.*, p. 80-85).

B-3- Seyed Abdul Hussein Mousavi Lari

Other constitutional scholar is Seyed Abdul Hussein Mousavi Lari. The most active period of his political life is related to the age of the rule of Mohammad Ali Shah and the time known as Minor Tyranny (Vosoughi, 2004, p. 137). The late Lari likened the parliament to the "Holy Shrine of Ka'ba" (Zargarinejad, *ibid.*, P. 395). He believes that the formation of the parliament is obligatory and the condition for the validity of its conclusion is the presence of sufficient people. The number of members, of course, varies according to time and place. In his view, the duty of the parliament is to comment on "the affairs of the party and the elimination of all corruptions and the protection of special rights" (*Ibid.*, p. 408). He considers the condition of membership in the parliament to be the four "obligation" conditions: perfection of intellect, maturity, knowledge and power (*ibid.*) For the conditions of perfection and completion of the Majlis he states that "at least, first of all, the first person of the Majlis should be a just and comprehensive jurist (*faqih*), and after that, his replacement and deputy should be appointed from just believers." In Lari's view, the sentence of the Speaker who is a just jurist as well, is valid and its implementation is obedient. The limits of his authority are two realms: "establishing the limits of Shari'ah, divine punishment, command for Friday, jihad, retribution" and "preference and determination of general laws and special interests such as removal, installation, punishment, restriction, change and conversion". In his view, the Speaker has the right over other members, his command is verdict and must be executed, and no one has the right to oppose his verdict.

He believes that "the general guardianship, the implementation of the Shari'ah limits, divine policies and obligatory verdicts" are the real right of a just religious ruler in any way, just as he has "the right to close the Shari'ah limits and divine policies", unless someone obstructs its closure with a religious excuse. In his opinion, no one has the "right to conclude a parliament", "the right to appoint" and "the right to choose" initially and continuously, unless he is justified by "the just Muslim ruler of constitutionalists" (*Ibid.*, p. 409).

According to the above points, from the point of view of Seyed Lari, the Speaker has an undisputed government and hence the sultan, if exists, is in charge of the executive role and does not have the power to rule by himself. According to Lari, the members of parliament, whose conditions are to be free from impurity, adorn themselves with Islamic morals, have a firm belief in the rules of the Qur'an and have a sincere intention to enter the parliament, have no choice but to consult the Speaker, the *faqih* (*Ibid.*, p. 410).

Regarding the necessity of applying the laws with the Shari'ah, in addition, he believes that "any opinion, council, fantasy or opinion that is contrary to the rules and laws of the Shari'ah and the religion of Islam and Muslims" is "nonsense of the revelation of the devils" and the criterion of validity of any opinion, council, and idea of every intellect are subject to its conformity with the "correct opinions and councils of the Great Prophets (AS), famous scholars, the successors of Imam (AS), and rules of Islamic Law" (Abadian, *ibid.*, p. 116).

B -4- Sheikh Mohammad Ismail Mahallati Gharavi

Another constitutionalist scholar is Sheikh Mohammad Ismail Mahallati Gharavi. After the parliament was shut down, he wrote a treatise entitled "*Al-Lathāli al-Marbūtah fī Wujūb al-Mashrūtah*"

in defense of the parliament and the constitution. In this treatise, by dividing the issues into two sections, “Major” and “Minor”, he considers the Major as “preservation of Islam” and the Minor as all measures to achieve the Major. The Major will always be constant and unchanging throughout history, but the Minor changes according to the times. It is the responsibility of the wise and the politicians to discern the Minor, which, in consultation with each other, turns it into a firm law. He considered the law and the parliament obligatory due to the introductory obligation rule, and considered the opposition to the National Assembly as a war against Imam al-‘Asr (AS), for he based this assembly on repelling infidelity and oppression (Zargarinejad, *ibid.*, p. 395.)

What is a new serious concern for Mahallati is the existence of oppression, the corruption of the rulers, and therefore the backwardness of Iranian society. He intends to achieve progress and prosperity through limiting the monarchy and eliminating oppression. He gives a solution in this regard:

“Limiting the occupation of a kingdom and restricting its application... to the limits and restrictions that, according to the rationalists and politicians of the country, are useful, cause the consistency of the country, and increase the power and glory of the state and the nation” (Zargarinejad, *ibid.*, p. 376).

As a legislator, he also considers the law of custom to be changed, but he sees the Law of Shari'ah as completely out of this issue (Abadian, *ibid.*, p. 102-103).

Mhallati but considered it imperative to imitate the scholars (*mujtahids*) only in the case of the general rulings of Shari'ah and minor foreign affairs, which are the same as those related to Shari'ah courts (Zargarinejad, *ibid.*, p. 539-530). He believed that *mujtahids* should not be involved in political affairs “of their own free will.” They should act according to the rulers of the country. They should bring these matters of the kingdom to the right level and implement them. (*Ibid.*, p. 498).

Due to the concerns of Shari'ah Law, Mahallati asks the *ulamā* to be present in the parliament and supervise the legislative process, writing:

“If our knowledgeable scholars, who are scattered in every corners of Iran, withdraw from this parliament and leave it to the politicians to implement the political standards according to the information they have obtained, then the policies of the Islamic country will be done according to the European countries. Therefore, the obligatory duty of the *ulamā* in this period, is not to turn a blind eye to the men of tyranny and tyrannical fantasies, and to ally with the political men of the country, but they must supervise the rules of civilization and organized politics by observing their application to the Islamic policies and the true civilization, that have been done in books and traditions” (Abadian, *ibid.*, p. 102).

Mahallati, in the position of discussing the legislation, considers the right of guardianship to *ulamā* as the expression of generalities, and also considers the validity of the opinions of others to be valid in minor matters (*Ibid.*, p. 104).

B -5- Mirza Ali Agha Thiqah al-Islam Tabrizi

Another constitutionalist scholar is Mirza Ali Agha Thiqah al-Islam Tabrizi. In his famous treatise entitled “*Risālat Lālān*”, he divides the constitutional government into three branches: the Legislature, the Judiciary and the Executive, and considers the role of the legislature as law-making (Tabrizi, 2003, p. 397.). He considers, of course, the scope of law-making by the legislature to be limited to “customary affairs” and its scope to be “state affairs” such as “determining the boundaries of the king and the subjects, receiving and giving, the boundaries of the country and abroad, taking taxes, soldiers and peace and war and other than what is necessary in the administration of the state and the consistency of the kingdom and the monarchy. As for the case of Shari'ah, he considers the ruling to be as the same as what is determined in the pure Shari'ah and is not changeable in the Iranian Constitutional Law” (*Ibid.*)

Tabrizi states that “the Iranian Constitution does not want heresy to be entered in the religion and considers customary law as the law of divine Shari'ah obligatory obedience to God. He does not want to introduce some negative principles into the country” and believes that “these points are observed in the constitution” (Ibid., p. 396).

Opposing the government of Muhammad Ali Shah who attacked the Majlis (ibid., p. 403.) and considering unprofessional the opinion of those who consider the Majlis al-Shura to be contrary to the rules of Islam (ibid., p. 405) states: “The survival of the Islamic monarchy and the Twelfth Shiite and the stability of the Iranian Monarchy is a position of “stopping” on the abolition of tyranny, that is, self-determination. This condition is impossible to do except under the public supervision of the wise and if the Infallible Prophet (PBUH) is in charge of consultation (i.e. in matters), what an excuse for an unusual forger like us to be in tyranny” (Ibid., p. 406).

B -6- Haj Agha Noorullah Najafi Isfahani

Another constitutionalist scholar is Haj Agha Noorullah Najafi Isfahani. During the period of Minor Tyranny, as a defender of constitutionalism, he wrote a treatise entitled “Conversations of Haj Moghim and the Traveler” (Zargarinejad, ibid., p. 417). He states about the parliament and its duties:

“In ordinary affairs and government affairs, the way of regulating the country and the provinces and the means of the advancement of the nation, trade, industry and agriculture, it is good that one hundred or one hundred and fifty wise men of each province, who are called lawyers, to sit in parliament in any way that suits the nation and the country. They vote, act, provide the way of saving the oppressed nation from foreign domination, and so on. In accordance with “و امر هم شوري بينهم” in the progress of the nation and the way of promoting trade, industry and prosperity in this parliament, that is called Dar al-Shura, they consult and announce the result to the nation” (Ibid., p. 431).

Beside to the legislative matter, he mentions “full supervision and care over the proper implementation and non-change in what is determined by the Owner of the Law,” among other duties of the nation’s lawyers. As a result of this supervision, the Law “between the situation and the noble, big and small, and the king and the beggar should be executed and so the change and transformation should not be done according to the whims and desires of the rulers” (Ibid., p. 431).

Najafi believes that “a law should be enacted for the king, the minister, the prince, the secretary, the ruler, the convict, the judge, and the officer, and each should be limited to the extent that everyone knows his duty from the king and the beggar”. The government should act in all matters in accordance with the law and the approval of the nation’s lawyers, and so “nothing should be done without the signature of the Council Assembly” (Ibid., p. 440-441).

As for the legislating, he divides the laws passed by the parliament into two categories: Since the rules of Islam and its halal (lawful) and haram (unlawful) are fixed until the Day of Judgment, the deputies can never enact a law that will change it. For instance, “without the defense of Shari'ah and the issuance of the rule of the obeyed Shari'ah, the ruler of Shari'ah takes the property of Zayd and gives it to ‘Amr or without two just witnesses or religious oaths, makes a sentence”. In this constituency the representatives can only legislate on what kind of courts to establish and a few disinterested religious people to sit in the judiciary so that God’s rule will be enforced and so the ruler will not be able to take bribes and change the truth to the false. The second type is issuing rules in “customary affairs” that can be changed. For example, “If a ruler goes somewhere and oppresses, he will not be the ruler anymore, or how giving soldiers are processed and what are their salaries, etc.

Citing the verses “و ما كان لمومن” and “و امرهم شوري بينهم”, he concludes that in some verdicts such as “the rules of inheritance and adultery, sodomy, wine, one-fifth, alms-giving, and other duties and prohibitions, there is no right to men for questioning, answering, denying, proofing, changing and conversing, and all Muslims must obey it. In another matters, about which a certain rule and law is not

prescribed in the Book and traditions, such as accidental events and public ordinary affairs, the characteristics of the order and regulations of the country, the strength and orderliness of the livelihood of Muslims, the security of roads and streets, etc., God the Almighty has referred these matters to consultation so that Muslims consult and behave as they see fit and good for the community (Ibid., p. 427).

Regarding the legitimacy of laws, he states that in all ages, five scholars should be supervised in the parliament so that the laws in question are in accordance with Islamic law (Ibid., p. 429).

Conclusion

Based on what has been stated in a comparison between the views of constitutionalist and legitimist scholars, it seems that there is no serious difference between the views of scholars such as Sheikh Fazlullah and Allameh Naeini. It should be noted however that the famous division of scholars into legitimists and constitutionalists is not an exact division, for scholars who are called constitutionalists for agreeing with the constitutionalism have different opinions from scholars who are known as legitimists for opposing to constitutionalism. For instance, there are many differences between the legitimists Najafi Marandi and Sheikh Fazlullah Nouri; Sheikh Fazlullah considers the opinion of the majority valid in the affairs of the country and agrees with the issue of legislation in customary affairs, provided that *ulamā* be present and supervise all laws. He also considers the scope of religion to include all matters of worship and politics and believes in the presence of jurists in political and social arenas, but Marandi does not accept the majority at all and seems to believe in a kind of separation of religious issues from political and governmental issues. He warns the jurists against interfering in political issues and believes that even though the king is a tyrant, we must not interfere his job and just we should be patient and pray! Or Ali Akbar Tabrizi, opposes the formation of a parliament without the presence of *ulamā*, even to regulate state and customary affairs. His legislative assembly is in fact comprised of a group of *ulamā*. Among constitutionalists, for example, Lari's understanding of the constitution is very different from others; At the head of his assumed constitutional assembly is a comprehensive jurist (*faqīh*), and the elected representatives are supposed as his advisers. In other words, both groups of scholars should be considered in one approach with different views.

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